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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 104.

MARSHALL DENTAL MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED JULY 15, 1910.

(22,260)

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1 In the Supreme Court of Iowa, May Term, 1908.

In Equity.

Filed Jan. 22, 1908.

No. 26064.

STATE OF IOWA Upon the Relation of CHARLES W. MULLAN, Attorney General, Plaintiff and Appellee,

vs.

J. N. JONES, FRANK MONTGOMERY and THE MARSHALL DENTAL MANUFACTURING COMPANY, Defendants and Appellants.

Appeal from Greene County District Court.

Hon. Z. A. Church, Judge.

H. W. Byers, Attorney General and George Cosson, Assistant Attorney General, Attorneys for Appellees.
E. B. Evans and C. L. Nourse, Attorneys for Appellants.

Appellants' Abstract of Record.

Due, legal and timely service of the within abstract of record is hereby acknowledged this — day of ——, 1908.

——— ———,
Attorneys for Appellee.

2 On the 29th day of August, 1906 the plaintiff and appellee herein filed in the District Court of Greene County, Iowa the following

Petition.

Comes now the State of Iowa upon relation of Chas. W. Mullan its Attorney General and respectfully shows to the court:

Paragraph 1. That the State of Iowa is the owner in fee simple of all that portion of section 36 in township 85, range 31 west of the 5th P. M., and sections 1 and 12 in township 84, range 31 aforesaid and sections 6 and 7 in township 84, range 30 west of the 5th P. M., in Greene County, State of Iowa, which were meandered by the government survey and excluded from the lands taken by the government as public lands under such survey, which said portions of the sections aforesaid constitute what is now commonly and familiarly known as Goose lake.

Par. 2. That Goose lake is a body of water about one and one-half miles long by three-fourths of a mile in width and of a depth of about eight or nine feet, lying within the boundary lines of the section aforesaid in Greene county; that it has well defined banks

and shores and is a permanent body of water, which was meandered and excluded from the public lands when said county was surveyed by the general government.

Par. 3. That the title to said lake and the land underneath the same and beyond the meander lines of the section aforesaid is in the state of Iowa, and that said state holds its title thereto by virtue of its sovereignty.

Par. 4. That it is now and for many years last past has been the policy of the state of Iowa to preserve for the benefit of the public all the lakes within its borders and not to permit the same
3 to be drained or the depth of the water therein to be decreased by any artificial means whatever.

Par. 5. That in violation of the policy of the state and in violation of the rights of said state in and to said land, the defendants J. N. Jones, Frank Montgomery and the Marshall Dental Manufacturing Company, with the aid and assistance of machinery, hired men and servants, are about to cut an open drain from said lake into the stream commonly known as Willow creek, and are about to drain the water from said lake and to flow the same off through the open drain which they are now about to construct.

Par. 6. That the drain or ditch proposed to be constructed by the said defendants will drain said lake and destroy the same, and that said defendants now have their machinery, consisting of a ditcher and other machinery, upon the ground and threaten to and will, unless restrained by the order of this court, construct said open ditch or drain from said lake and draw the water therefrom and totally destroy said lake.

Par. 7. That the state of Iowa and the general public will suffer irreparable injury if said lake is drained and destroyed as the defendants are now threatening and attempting to do; that the state has no adequate remedy at law and no means of preventing the destruction of said lake and the irreparable injury caused thereby, except by an action of injunction.

Par. 8. That the ditch proposed and threatened to be excavated and constructed by the defendants will extend beyond the meander lines of the section aforesaid, and in and upon the lands of the state, and will constitute a perpetual trespass thereon by the defendants.

Wherefore the plaintiff prays that the said defendants, their servants and agents and all persons engaged in the attempt
4 to excavate and construct a ditch or drain to drain and carry off the waters of said lake, be enjoined by this court from in any manner excavating or constructing a ditch for the purpose of draining the waters of said lake, and from in any manner trespassing upon the land of the state under the waters of said lake and beyond the meander lines of the section aforesaid.

That a temporary injunction issue at once herein upon presentation of this petition against all of said defendants, their servants and agents and that upon final hearing said injunction be made perpetual, and that the plaintiff have such other and further relief

as may be equitable and necessary to preserve said lake to the state and to the public.

Temporary Injunction.

Upon the filing of said petition and without notice to the defendants, the Hon. Z. A. Church, issued a temporary restraining order as prayed for in plaintiff's petition.

On the 15th day of September, 1906, the defendants filed the following

Answer.

Now come the defendants above named and answering the petition of the relator filed herein, say:

Paragraph 1. These defendants deny each and every allegation of Paragraph 1 of said petition, and especially deny that the state of Iowa is the owner in fee simple, or otherwise, of that portion of Section Thirty-six (36) in Township Eighty-five (85), Range Thirty-one (31), West of the Fifth P. M. and Sections one (1) and twelve (12) in Township eighty-four (84) Range thirty-one (31) and Sections six (6) and seven (7) in Township Eighty-four (84) Range Thirty (30), West of the fifth P. M., in Greene County, State of Iowa, which were alleged to have been meandered by the Government survey and excluded from the lands taken by the government as public lands under such survey, known as Goose Lake, and denies that the state of Iowa is the owner of any part thereof or that it has any interest whatsoever therein.

Par. II. These defendants deny the allegations of Paragraph two of said petition, and especially deny that said Goose Lake is a permanent body of water, and that it has well defined banks.

Par. III. These defendants deny each and every allegation of Paragraph three of said petition and especially deny that the title to said property known as Goose Lake and the land therein is in the state of Iowa, and deny that it has any title thereto by virtue of its sovereignty or otherwise.

Par. IV. That as to the truth of the allegations in paragraph four these defendants have neither knowledge nor information sufficient to form a belief.

Par. V. Answering Paragraphs five, six, seven and eight of said petition, these defendants admit that they were about to cut and open a drain from said alleged lake for the purpose of draining lands belonging to defendant, the Marshall Dental Manufacturing Company, but these defendants deny that they were about to drain any lands or ditch any lands in any manner belonging to the state of Iowa, or in which it had any interest, and deny that the ditch proposed to be excavated by these defendants would in any manner trespass upon any lands belonging to the state of Iowa.

Par. VI. The defendants deny each and every allegation of said petition not herein expressly admitted.

Par. VII. Further answering these defendants say:

That the property described in the Relator's petition is
6 not and never was a lake or permanent body of water but aver that the same was and is swamp land, wet and unfit for cultivation, and that the same was granted to the state of Iowa by the United States of America under an act of congress of date September 28th, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits."

And that the state of Iowa granted all of said property and all of its interest herein to Greene County, Iowa, the county in which said property is situated, by an act of the General Assembly of the state of Iowa, approved January 13th, 1853, entitled "An act to dispose of the swamp and over-flowed lands within this state", etc, and that by *means* conveyances, all of the right, title and interest of the state of Iowa, and all of the right, title and interest of Greene County, Iowa, in and to said property, passed to and is now and was at the time of the happening of the matters and things set forth in Relator's petition vested in the defendant, the Marshall Dental Manufacturing Company.

Wherefore defendants have fully answered, ask that they be dismissed with their costs.

On the 13th day of June, 1907 the defendant, the Marshall Dental Manufacturing Company, filed the following

Cross Petition and Amendment to Answer.

Leave of court first being had and obtained, the Marshall Dental Manufacturing Company, by way of Amendment to their former answer and for their Cross Petition herein state,—

Paragraph I. That the defendant, the Marshall Dental Manufacturing Company, is a Private Corporation organized under the
7 laws of the State of Iowa; that its principal place of business is Des Moines, Iowa.

Par. II. That the defendant, the Marshall Dental Manufacturing Company, is now in possession of, and the absolute owner of that portion of Section Thirty-six (36) in Township Eighty-five (85), Range Thirty-one (31) West of the Fifth P. M., and Sections One (1) and Twelve (12) in Township Eighty-four (84), Range Thirty-one (31) and Sections Six (6) and Seven (7) in Township Eighty-four (84), Range Thirty (30), West of the Fifth P. M. in Greene County and State of Iowa, lying within and between the meander lines established by the government survey.

Par. III. The defendant further states that the lands described in the preceding Paragraph, and lying between the meander lines established by the government survey, were by mistake or otherwise excluded from the government survey made and executed in the year 1853 and were omitted from the report of the surveyor, said report erroneously designated said land as being a Lake.

Par. IV. The defendant further states that the land described in Paragraph I, in this Amendment, and lying between the meander

lines established by the government survey, was on the Twenty-eighth day of September, 1905, swamp and overflowed land and passed to the State of Iowa under grant of Congress September 28th, 1850, and was included in the grant of the State of Iowa May 10th, 1853, wherein the swamp and over-flowed land in this state was granted to the respective counties in which such land was situated.

Par. V. The defendant further states that the meander lines as established by the government survey and the plat and field notes of such survey, de-ignating the land lying between such meander lines as a Lake, was a mistake and wholly wrong for the
8 reason that there is not now, or never was, a permanent body of water situated between said meander lines upon which said lines could be based and that said meander lines were of effect only as establishing the boundary between this defendant's land and the land of the adjacent owner.

Par. VI. The defendants further state that they obtained their title and ownership to said land above described under and by virtue of the laws of the United States, being the act of Congress of September 28th, 1850, granting to the State of Iowa the swamp and over-flow lands within said State and under and by virtue of the act of the legislature of the State of Iowa, (4 G. A. Ch. 13) approved January 13, 1853, granting to Greene County the swamp and overflowed lands within said County and under mesne conveyance from Greene County to the defendant the Marshall Dental Manufacturing Company, as will more fully appear by the abstract of title hereto attached, marked "Exhibit A." and made a part of this Cross Petition.

Wherefore, the defendant, the Marshall Dental Manufacturing Company, prays as in the former Answer of defendants that the plaintiff's Petition be dismissed and that the plaintiff be decreed to have no interest or title in said real property. This defendant further prays that the title to said property be decreed in the Marshall Dental Manufacturing Company, and that the claim of the plaintiff be forever barred and held for naught and for such other and further relief as this defendant may in equity be entitled to.

9 "EXHIBIT A."

Abstract of Title.

No. 1.

United States
to
State of Iowa.

"Grant." Conveying all the Swamp and overflow lands. In the State of Iowa. Acts of Congress, Sept. 28th, 1850.
(9 Stats. 519.)

No. 2.

State of Iowa
to
Greene County.

"Grant." Conveying all of the Swamp and Overflow Lands in Greene County to Greene Co. Acts, Legislature of the State of Iowa. Miller's rev. Code Ia. Sec. 925, page 1107.

No. 3.

Greene County
to
American Emigrant Company.

"Contract." Conveying all the Swamp and Overflow Lands the County was entitled to under the Acts of the State Legislature on Jan. 13, 1895. Dated Dec. 9, 1861, by Co. Judge.

No. 4.

Greene County
to
American Emigrant Company.

10 "Deed." Conveying all the Swamp and Overflow Lands the County was entitled to under the Acts of State Legislature, Acts, Jan. 13, 1853, and carrying out Contract of Dec. 9, 1861. Dated Sept. 7, 1863, filed in the record of Greene Co., in Book "H" P. 134, describing certain lands and conveying all other lands it may be entitled to under the Swamp Land Grant.

No. 5.

Decree of District Court
to
American Emigrant Company.

Confirming Deed of Greene County dated Sept. 7, 1863, dated Nov. 2d, 1875, filed for record Feb. 17, 1886. Records of Greene County, Iowa, Book 37, P. 339, enjoining said County from claiming the same or any part thereof, or interest therein, or in any manner interfering with the claims of the said American Emg. Co.

No. 6.

American Emigrant Company
to
Jas. Callanan & Jas. C. Savery.

"Deed." Describing certain lands and conveying all other lands that they were entitled to under their Deed from Greene Co.
11 dated Sept. 17, 1885, ackg. Nov. 25, 1893. Recorded in Book 37, P. 299, Record of Greene Co., Iowa.

No. 7.

James C. Savery (Bachelor)
to
James Callanan.

"Deed." Describing and conveying certain lands and conveying all his right, title and interest in all other lands not heretofore deeded by him, described in Deed made by the American Emigrant Company to Callanan & Savery of date Dec. 17, 1885, Sept. 13, 1893, filed Nov. 25, 1893, Ackd. Nov. 14, 1893.

No. 8.

James Callanan and Wife
to
E. P. Fuller.

"Deed." Describing Lake Beds, Pond or Marsh and conveying in Section 6, 35, 08. "A" in Sec. 7, 24, 82, "A" more or less in Twp. 84, Range 30 in Sec. 1, 356, 38, "A" in Sec. 12, 67, 73, "A" more or less Twp. 84, Range 31, being the unsurveyed land in said Sections outside of the meander lines." Dated Apr. 15th, 1895.

No. 9.

Surveyor of Greene County, Survey Plat and Report made May 7th and 8th, 1895. Filed at the County Surveyor's
12 Office, filed at the State Land Office, June 17, 1895 filed at the United States Land Office, Des Moines, and forwarded by that office to the G. L. O., Washington, D. C. August 22, 1895.

No. 10.

Description. Lot "5½, (350,56, "A") Sub-divided in Lots No. 6, (56,84 "A") Lot 7, (30 48 "A") Lot 8, (17,80 "A") Lot 9, (46,90 "A") Lot 10, (45,80 "A") Lot 11, (32 84 "A") Lot 12, (40, "A") Lot 13, (40 "A") Lot 14, (40 "A") Section (1) Lot 2½ (68,63 "A") Sec. Twelve (12) Twp. 84, Range 31. "Lot" 2½ (63,35 "A") Sec. Six (6) Lot 2½, 32,10 "A"), Sec. Seven (7), Twp. 84, Range 30, W. 5 P. M.

No. 11.

E. P. Fuller and Wife
to
George H. Layman.

"Warranty Deed." Filed for record March 26th, 1896. Recorded in Book 46, P. 347 of the records of Greene Co. Conveys the land described in Nos. 9 and 10.

No. 12.

George H. Layman
to
Marshall Dental Mfg. Co.

13 "Warranty Deed." Dated Dec. 9th, 1896, filed Jan. 7th, 1897 in Book 46, P. 448. Conveys certain portion in land described in Nos. 9 and 10, being the land in controversy.

On the 2d day of September 1907 the Plaintiff filed the following

Reply.

The plaintiff by way of reply to defendant's answer denies that said land in controversy described in plaintiff's petition is now, or ever was swamp land or that the same ever passed to the state of Iowa by Grant from the United States by an act of Congress of date September 28, 1850, or that the same ever passed to Greene County, Iowa, by Grant from the State of Iowa, by an act of the General Assembly of said state approved January 13th, 1853, or at any other time, or that the same ever passed by mesne conveyances from said Greene County, Iowa, to the said defendant, the Marshall Dental Manufacturing Company.

The plaintiff further avers and charges the facts to be that the lake in controversy herein was by the land department of the Federal Government meandered and platted as a lake and excluded from the public lands when Greene County was surveyed by the General Government; that whether or not the lake in controversy, now known as Goose Lake was a body of water proper to be meandered and set apart as a lake and is a question of fact to be determined solely by the Federal land Department and Secretary of Interior; that as before stated, said land Department did in 1853 when it surveyed Greene County, determine that said body of water was a lake proper to be meandered and did meander said lake, all of which is shown
14 by the field notes of survey and plat in the Land Office; that on or about the 27th day of October 1903, the defendant, the Marshall Dental Manufacturing Company made an application to the Secretary of Interior to have said Goose Lake surveyed and alleged in said application that said Goose Lake was not in fact a body of water proper to be meandered at the time it was so meandered but that same was swamp and over-flowed land; that after due and proper hearing and consideration of the above and foregoing application of the said defendant the said Secretary of the Interior adjudged, determined and decreed that there was no evidence to impeach the field notes of the original survey, thereby confirming the action of the surveyor in meandering said lake, and determining that it was at the time it was meandered, a body of water proper to be meandered, and segregated from the public lands.

Plaintiff further alleges that this application was made by the Marshall Dental Manufacturing Company, the defendant herein and that said Marshall Dental Manufacturing Company and each and all

of the defendants in this suit are concluded and bound by the action of the Land Department of the Federal Government, and the adjudication and finding of the Secretary of the Interior.

Proceedings.

On the 21st day of June, A. D. 1907, by agreement and stipulation of the parties, the following proceedings were had before G. S. Tolliver, a Notary Public in and for Greene County, Iowa, the testimony by agreement of parties being taken in shorthand by C. L. Dahlberg of Des Moines, Iowa, it being stipulated that when such testimony was so taken and transcripted, that it would have the same force and effect as though taken in open court, and that the objections made to such testimony at such hearing should have the same force and effect as though made in open court.

15 The following testimony was offered on behalf of the defendant.

H. W. Bean.

My name is H. W. Bean; occupation Civil Engineer; I am sixty-three years of age, resident of Jefferson, Greene County, Iowa; have lived in this county since the year 1879. From 1885 to 1900 was County Surveyor of Greene County and have followed the profession of Civil engineering since my retirement from the office of County Surveyor. I am acquainted with the tract of land commonly spoken of as Goose Lake in this County. It includes a part of Sections 6 and 7, Township 84, Range 30, and of sections 1 and 12 in Township 84, Range 31. I have known this land ever since I lived in the County; have surveyed it two or three times; the first survey was in 1889, when I retraced the meander lines; the next survey was in 1893 when I surveyed the land for E. P. Fuller. At that time I prepared a plat and field note. The next survey was in 1895 for the Marshall Dental Manufacturing Company and I prepared a plat and field note for them. The six sheets of paper attached to Exhibit No. 1, is a plat of the land and is the plat I made for the Marshall Dental Manufacturing Company.

The State objects to the present question, and to each and every question hereafter to be propounded to this witness for the reason that the same is incompetent, immaterial and irrelevant, and is an effort to contradict and overthrow the finding of the Land Department and the Secretary of the Interior by parol evidence.

Mr. Evans: It is agreed that the above objection may be considered as made to each and every question to be propounded to his witness as specifically as though made at the time such question was asked and answered.

16 The certificate attached to these sheets correctly represents the date the plat was made, that is, March 30th, 1896.

The plaintiff now offers in evidence the six plats attached to Exhibit 1, just identified by the witness.

Int. 21. Does the meander line as drawn on these plats just offered in evidence, correctly describe the meander line of the government survey made in 1851?

A. Yes, with one exception.

Int. 22. You may describe that exception and tell where it is, and what it is?

A. It is in Section 1-84-31.

—. ——.

A. It is the first two bearings on the west side of the lake, leaving the north line of Section 1. Now, the plat,—the government plat shows that these lines there are south and west. The notes make the first line South 20, East 6:50. The second line on the plat shows a bearing to the south and west, but the notes make it south 45, East 3 chains and 50 links. Now, platting it in that way, there is according to the notes—it carries the west line of the lake clear into the lake, forty rods into the lake, but the government plat shows that these two lines bear to the West.

Int. 24. Then the mistake in the government plat is in using the letter "E" in the place of "W" in these two bearings?

A. Yes.

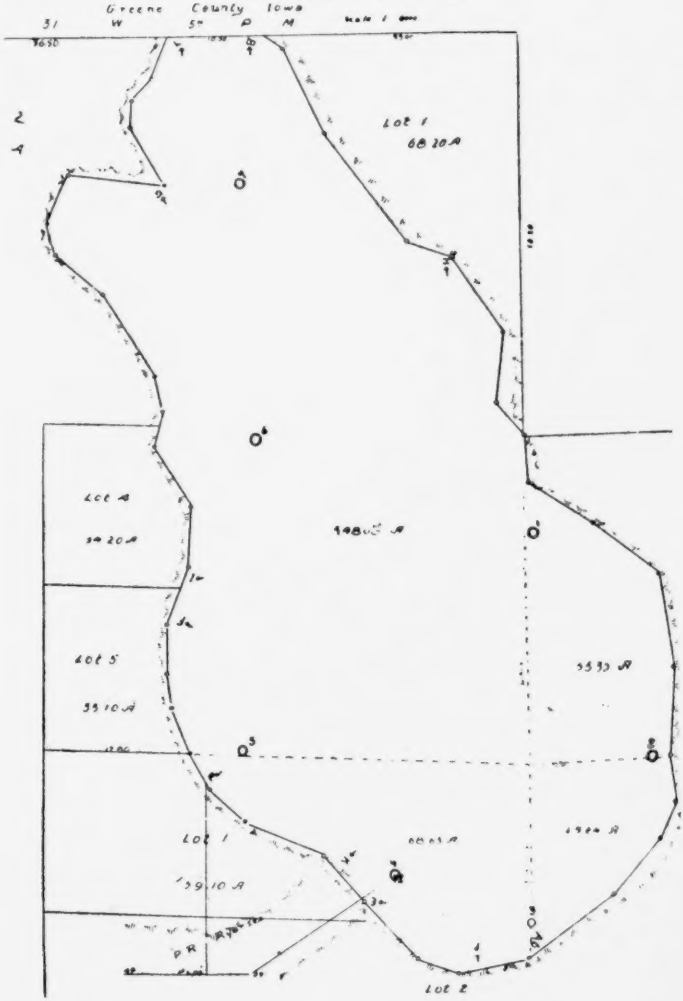
Int. 25. But the government plat is exactly as your plat?

A. Yes; changing these and following the government plat, I can plat the West Meander line of the lake and correct the meander corner on the south line of the Section 1. Plat marked No. 2 correctly represents the government meander line, as I ran them of the land in controversy, and is a copy of the plat represented by the six sheets attached to Exhibit "A". It correctly represents adjacent lots and meander line and acreage of lots.

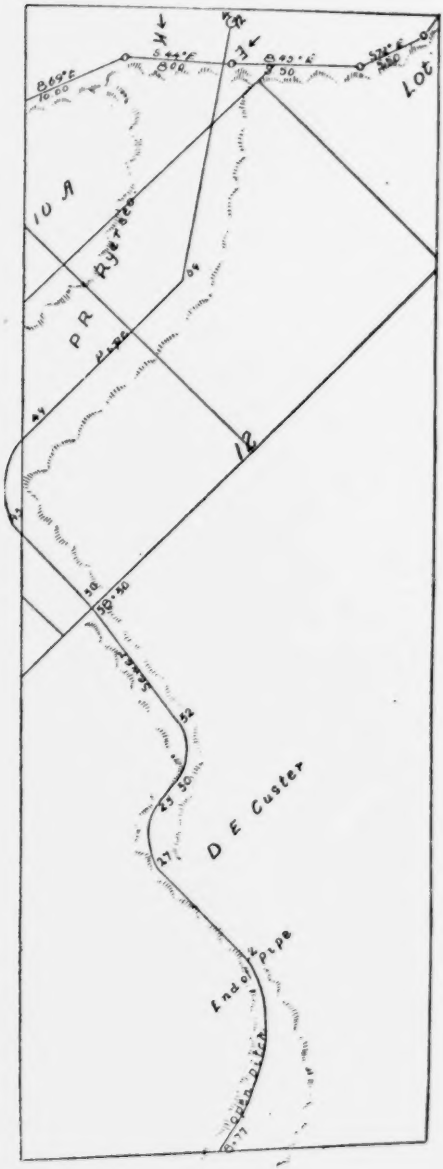
17 The defendant offers in evidence Exhibit No. 2 the plat the witnesses just identified.

Inasmuch as the record shows that the six sheets of paper attached to Exhibit No. 1 was the original, from which Exhibit No. 2 was copied, and as Exhibit No. 2 is in one complete sheet, we content ourselves in this abstract in exhibiting but one plat of exhibits 1 and 2 as follows:

EXHIBITS 1 AND 2.



(EXHIBIT- 1 AND 2 CONTINUED.)



19 Figures 1, 2, 3, 4, 5, 6 and 7, between the meander line as shown on plat exhibit No. 2, with the little circle beside said figures represent the points where I dug down to see what the subsoil was, and the numbers are simply references to these points. Exhibits No. 3 and 4 are copies of my report to Mr. Fuller. Exhibit No. 5 is a copy of the affidavit I made for Mr. Fuller or the Marshall Dental Manufacturing Company.

The surface of the soil at the places designated on the plat, Nos 1 to 7, was of a vegetable mold and was the following depths at the several places:—No. 1, 20 inches deep; No. 2, 30 inches deep; No. 3, 30 inches deep; No. 4, 28 inches deep; No. 5, 30 inches deep; No. 6, 20 inches deep and No. 7, 20 inches deep.

Beneath this soil there was some sand, a little gravel and underneath that was clay,—a blue clay. I made these soundings in 1895 or '96. There was not much water in the lake at that time. It was a soft quagmire. There was no standing water at either of the places where I made the soundings. The soil was stiff enough so it would stand the digging. I examined the like this morning. There is some water in it. I presume it may reach 18 inches deep, it is largely covered with rushes of two or three years' growth. Since I have known the lake it has been in that condition a good many times. During the very wet seasons there is more water in it. I have seen it when there was ten feet of water in it but in dry time it goes dry. When I seen it ten feet deep it was exceedingly wet. There is no regular inlet or outlet except as water runs over from the surrounding surface. There is nine hundred acres of land that drains directly into the lake, that is, surface water that runs in from the adjoining land. The water must be six or seven feet
20 deep before it runs over the ground out of the lake. When I saw the lake when it was ten feet deep the water was running out southwest. It is a basin surrounded by high land. Whether the water ran out or not depended entirely upon the condition of rainfall and snow. I have examined the edge or the banks of the lake. I don't remember to have seen any rocks there. The soil of the banks is substantially the same as the other soil, mud and mud shores. I guess there are no trees there except such as have been planted, that is—trees on the banks. There is no material difference between the bed of Goose Lake and other ponds in the County. There are other large ponds of the same character throughout the County, not only adjoining but throughout the County. There is a slough called "Bullhead" south of Cooper, that has more of an outlet. There are others to the southwest part of the county. They are designated as sloughs. None of them are meandered. They are surveyed and platted. Bullhead Lake had just such a mud bottom; during high water it develops quite a lake and in dry times it is practically dry. It has probably two to three hundred acres. The character of Goose Lake and Bullhead Swamp or Lake is practically the same. Their shapes are different. In so far as the soil and growth and the condition as to water in the two basins, they are substantially the same.

The defendant now offers in evidence Plat Exhibit No. 2, the report and affidavit thereto attached, marked Exhibits 3, 4 and 5.

EXHIBITS 3 AND 4.

E. P. Fuller, Esq., Cedar Rapids, Iowa.

SIR: In accordance with instructions in your letter of
21 April 24" 1895 and of later verbal instructions to me, I have made a survey and map of Goose Lake and vicinity with reference to draining the Lake. The main object being to obtain an outlet through which the bed of the lake can be effectually drained and thereby converted into farming land. The map profile, and estimate herewith submitted are a part of this report. The route adopted is shown on the map and commences 279 ft. North of the South west corner of section 12 Tp. 84 N. R. 31 W. of the 5th P. M. in Ia.:

Thence running in a general North-easterly direction, entering Goose Lake a little North west of the North west corner of the South east quarter of the North east quarter of said section 12 and terminating about 200 ft., inside of the Meander line. It follows a natural water course to its source, which is within about 300 ft. of the bank of the lake. From Sta. 8 x 13 to Sta. 21—1287 ft., is calculated for an open ditch, 3 ft. wide on the bottom and a slope of bank of 2 base to 1 perpendicular. From Sta. 21 to Sta. 72—the terminus of the outlet—5100 ft., is calculated for 18 inch sewer pipe. The rate of grade fall for the entire outlet is 16-100 ft. per 100 ft. of distance. The total grade fall for the entire distance—6387 ft. is 10.24 ft. The grade line at Sta. 72 is 7.60 ft. below the bottom of the lake. Through the 18 inch pipe with a fall of 10-100 of a foot per 100 ft. the water will flow with a velocity of 2½ ft. per second and when 9-10 full will discharge 14400 cu. ft. of water per hour. It is calculated to be ample capacity for three 12 inch and one 10 inch pipes through the bed of the lake, connecting with the outlet at Station 72, the three connecting lines to have a maximum rate of fall of 1-10 of a per hundred feet. The drainage *acre* was taken at 900 acres at a flood average of 1 inch per hour of rainfall.

Referring again to the map, the circles marked 1, 2, 3, 4, 5, 6
22 and 7 indicate where etst pits were sunk to subsoil which at every pit is blue clay overlaid with a thin strata of sand from one to six inches thick, except at pit No. 6 where a straia of sand and gravel 22 inches thick intervenes between the surface soil and blue clay. The surface soil is a vegetable mould 20 inches deep at pit No. 1; 30 inches at pit No. 2, 30 inches deep at No. 3, 28 inches deep at pit No. 4, 30 inches deep at pit No. 5, 20 inches deep at pit No. 6 and 20 inches deep at No. 7. There is but very little water in the lake, but the late rain- have rendered the bed of the lake a first class quagmire.

Referring to the profile, it shows that the greatest depth is at Station 49 being 16.30 ft. The average depth of the pipe is 13.66 ft. and the average depth of the entire outlet is 11.52 ft. I am satisfied that this line is the cheapest and most practicable one possible for the purpose required.

The lower terminus is in the head of a ravine that leads to Har-

din Creek about one half mile South west. The area was calculated from the government Meander notes, and includes all land inside the Meander lines.

Jefferson, Iowa, May 14, 1895.

Very respectfully, H. W. BEAN, *C. E.*

EXHIBIT No. 5.

Affidavit as to the Character of Unsurveyed Tract of Land, Situated in Sections One and Twelve, Township Eighty-four, North Range Thirty-one, West, and Sections Six and Seven, Township Eighty-four, North Range Thirty, West of the Fifth Principal Meridian, in Iowa.

STATE OF IOWA,
Greene County, ss:

I, H. W. Bean, being duly sworn, depose and say that, I reside in Jefferson, Greene County, Iowa; am fifty years of age; am
23 a civil engineer by profession; have been in practice thirty-one years. Am an old resident of Greene County, Iowa. That on May 7th and 8th of May this year, I surveyed the above described unsurveyed tract of land with reference to obtaining an outlet for its thorough drainage, its entire drainage area, and depth and character of soil. There is practically no water in the slough at present, but the late rains have converted it into a quagmire. To ascertain the character of the soil in the slough (or lake as it has been improperly called), I sunk seven test pits, marked by small circles, and numbered from one to seven inclusive on the map filed herewith. I found a vegetable mould and black loam about thirty inches deep, at all points, underlaid by a strata of sand from one to six inches deep, except at No. six, where a strata of sand and gravel twenty-two inches deep rests on the sub-soil of blue clay. The loam is twenty inches deep at this point. The character of the tract is swamp, being a depression in the prairie, having no natural outlet, and no source except melting snow in the spring, and rain falling in the basin.

I surveyed tracts adjoining it in 1878 and since, and know it to be a reed marsh or pond without any characteristics of a lake.

H. W. BEAN.

Subscribed and sworn to before me by H. W. Bean, to me known to be a creditable citizen of this county, this 30th day of May, 1895.

[SEAL.] J. M. FORBES,
Notary Public in and for Greene County, Ia.

Cross-examination by Mr. COSSON:

In cross examining this witness the state does not waive any of its former objections made to the testimony of the witness in chief.

24 There would sometimes be three or four years that I would not see the lake. At other times I saw it more often. The

first time I surveyed the lake I retraced the meander lines. The second time I retraced the meander lines. There was some more water in there than there is now. I think it was about the same as to rushes when I made the plat for the Marshall Dental Manufacturing Company. I think that was in 1895 or in 1896. The report for Mr. Fuller was in April, 1895. I should judge there was about 18 inches of water now. It may reach 20 inches. There are no holes. There was none when it was dry. There are no deep holes in it. It is just uniform depth that ran out. It was uncommonly dry in the year 1893 and 1894. That was when we had the hot winds. I don't remember that I saw the lake dry at any other time than then. The year 1880 was the first time I was ever over in that country. There were row boats and little skiffs on the water at that time. So far as that is concerned there were row boats along the shore when it was perfectly dry. There are a couple of little boats there now. They were not used when I was there, but as I remember it, they could be used.

Mr. Cosson:

Q. Now this lake or basin has on all of its sides, except one corner of it—has well defined rim or banks, does it not?

A. Yes, it has a slight edge sufficient to mark it. So that you could tract it. It is not abrupt.

Int. 26. Now on the southwest side, how high would you say the banks were?

A. I think where I first ran a line for a drain out of the southwest in Section 12, running in a southwesterly direction, I think that it was something like four or five feet above the bottom. Of course, it raises a little further back slightly and then falls off again.

Int. 27. Take it generally along the south side from where the meander line is now located, how much of an elevation in your opinion is there from the body of the lake to the ground at the point of the meander line?

A. Oh, I should say, it will vary probably from three to five or six feet. Maybe a little more.

Int. 28. In places it runs probably eight or ten feet?

A. I could not say. I never took levels with reference to that.

Int. 29. Now, over on the east side of the lake—generally along the east side of it, how high are the banks there?

A. Oh, they are not—they are three or four feet perhaps. Running up or sloping up three or four feet and perhaps a little more above the lowest part of the lake or pond. I don't know just how much. I located the meander, the meander line for the Dental Mfg. Co. in 1896 and I think the fence was built along the meander line. They had let a contract at that time to build a fence. I am not at present in the employ of the Marshall Dental Mfg. Co. I just work for them from time to time as they want work in this vicinity—whenever they call on me. The water's edge this morning is some distance back from the meander line. It has receded materially since I first saw it. In 1889 the water's edge was right up

close to the meander line. Yes the black soil has washed in from the hillside more or less. When I made the soundings in 1895 I think there was something like six inches of sand under the vegetable mold. The shallower the water, the greater the vegetable growth and the faster the vegetable mold will accumulate as the vegetation dies. I would not attempt to foretell, with any accuracy, the exact character of the land in 1853. The place the water would overflow is on the south to the southeast. The point where the lake overflows extends down I expect a couple of miles, more or
26 less. It is sometimes narrow and widens out and then narrows. The surrounding land is considerably higher than the bed of the lake. The water flows in there, evaporates and seeps away. When it gets high then it overflows in these low places.

Redirect examination by Mr. EVANS:

When the lake was ten feet deep the overflow was so deep that a horse had to paddle pretty well to get through the mud and water. Other years the water would be from twelve to eighteen inches deep where it was flowing out. The boats were used for fishing and trapping. I never saw any pleasure boats there.

Int. 6. You speak of the banks being well defined, in answer to one of the counsel's questions. Isn't it true that even now, commencing at the water's edge and running back there is a gradual slope up the hill to the higher places?

A. Yes; but there is a sort of a well defined rim along the north side. I don't think the ice in the lake floats about very much. It freezes to the vegetation and it holds it to place. There would be a little pushing about but not notic-able. The line running out southwest on exhibit No. 2, for Section 12, is a line for tile drain I located for the Marshall Dental Mfg. Co.

Int. 11. That is your line and figures as to what would be necessary in order to drain the lake?

A. Yes.

Int. 12. Going in that direction—southeasterly direction from the lake, how long a ditch did you find it would be necessary to dig in order to drain the lake?

A. Well, we could drop tile at 4900 feet from the shore of the lake. That shows the line about 200 feet into the lake.
27 From the upper end of that in the lake to the end of the tile. is shown on the plat as 5100 feet. We could drop the tile there at that point into the open ditch and we opened the ditch into the head of a ravine running into Hardin Creek.

Int. 13. How far is Hardin Creek from the lake approximately?

A. Well, it is a mile and a half.

Int. 14. How far and in what direction is Willow Creek from the lake?

A. East.

Int. 15. How far?

A. A trifle over a mile to the east.

Int. 16. How deep would the ditch be, draining to the southwest?

A. The deepest point I think was 16.6 feet. Something like that at the deepest point.

Int. 17. How deep would it have to be at the meander line?

A. I don't remember now. I have a profile which was 7.6 feet there in the bottom of the lake at station 72.

Int. 18. You say now, if you started at the place of the circle and figure 72, at 7 feet deep in the center of the lake?

A. 7-6 feet deep.

Int. 19. You think, it would require before you got to Harding Creek, in the deepest place, a ditch 16 feet deep?

A. Yes, that was only a short distance, however. The ground falls off.

Int. 20. That would then make the deepest place in the proposed ditch nine feet above the depth of the lake at the point of the circle 72, approximately?

A. Well, it would be 7.6 feet less the fall. That would make it about eight feet.

Int. 21. In answer to the counsel's question, you said, the
28 water had receded materially from the time you first saw it. Do you mean by that that there is any material receding of the water at the present time, from what it would be in dry years, during earlier years?

A. Oh, no. It would grow less and less as it gets dryer, but I think that there has material washed in there and there is an outer rim of the lake that is higher than it was years ago. Now, I reason from this, that as these hills and slopes have been cultivated and the wind has blown it in and the water washed it in, it would be perfectly natural for a bank to rise up.

Int. 23. What I am getting at is this, Mr. Bean. Whether or not, the condition of the lake now, as you described it this morning, has the amount of water and the growth in it, whether it is substantially the same as the years you first knew it in dry seasons.

Objected to as leading and suggestive.

A. I don't think there is as much water in it as the first year that I knew it. I don't think there is much difference in the vegetation.

Int. 24. State whether or not the vegetation was such as to preclude boating during a portion of each of the years?

A. Yes. In a few places it would be too dense to boat there, and in other places there would be patches of clear water, just as it would be now, if the water was six or eight feet in it.

Recross-examination by Mr. Cosson:

You put in four or five feet more of water and a good many of the shorter weeds would not show much. There would be more clear water.

Int. 3. You say at the point of the proposed ditch to run into Hardin Creek down in the meander line there, you would
29 have to dig seven feet deep—it would have to be seven feet deep?

A. 7.6 below the bottom of the lake.

Int. 5. And then about how far away from that east at this point where you say it would be necessary to go 16 feet?

A. About a thousand feet, or something like that.

Int. 6. About the fifth of a mile?

A. Just about. Something like that. That is just mere estimate.

Int. 7. At that particular point where you have to go about 16 feet, the land is less raised there. Is that a mound or a raise?

A. No, sir. It is just a sag going through on the ground—going through to the southwest.

Int. 8. How much of a fall would you get, beginning from the bed of the lake to the Hardin Creek?

A. The tile was laid 1.16 of a foot per one hundred feet. That is about two inches to the foot. The banks around Bullhead Lake are about as abrupt as they are at Goose Lake. Bullhead Lake is more of a channel and the lake here is a basin. I surveyed Bullhead Lake. We went up the middle of that slough. The boys were in the water waist deep. The bed was about the same as compared to this. I never sounded the sub-soil. The water runs off quicker from Bullhead Lake than Goose Lake—it has more of a channel.

H. A. BEAN recalled.

Examined by Mr. EVANS:

By agreement, the same objection heretofore made to the testimony of this witness is to be considered as made to each and every question now propounded.

30 I was present when Mr. Evans took certain photographs of Goose Lake. I have placed on Plat Exhibit 2 a letter "A." Mr. Evans was standing about one hundred feet south of letter "A" when the first photograph was taken. If a camera was standing at a point one hundred feet south of the letter "A." Exhibit No. 6 would be a correct view of that portion of the lake, looking toward the arrow head and letter A, placed opposite the lake. Exhibit No. 8 correctly represents that portion of the lake between the letter designated "A" and the letter and arrow head designated "B." Exhibit No. 9 correctly exhibits that portion of the lake between the place one hundred feet south of the letter "A" and the letter "C" and arrow head. Exhibit No. 7 is a photograph of that portion of the lake between one hundred feet south of the letter "A" and the letter "D" and the arrow head. Exhibit Nos. 7 and 9 correctly represent that portion of the so-called bank of the lake lying along Lot 2 of Section 12 and Lots 1 and 2 of Section 6. The letter "O" with the arrow head on Exhibit No. 9 designates the outlet or overflow of the lake. The letter "E" with the arrow head is the place in the lake of which Exhibit No. 10 is a photograph and is correctly represented. Exhibit No. 11 is a photograph of that portion of the lake represented on Plat Exhibit No. 2 by the letter "F" and the arrow head. Exhibit No. 12 is a photograph of that portion of the lake designated by the letter "G" and the arrow head on Plat Exhibit 2. The place marked "A-B" on Exhibit No. 2 is the point where the ditch was commenced by the Marshall Dental Mfg. Co. If the

camera was located at the place where the letter "A-B" is marked on No. 2. Exhibit No. 13 is a photograph, running in a northeastern direction along the meander lines. Exhibit No. 13 is a photograph of the bed of the lake as indicated by letter "H" and arrow head on Plat Exhibit 2. If the camera stood as designated by the
31 letter- "A-B" on Plat 2, Exhibit 14 would correctly represent a photograph of the lake indicated by letter "I" and an arrow head placed on Plat Exhibit 2. If the camera was placed on the letters "A" and "B" on Exhibit 2, Exhibit No. 15 is a photograph of that portion of the lake designated by the letter "J" and arrowhead on Plat Exhibit 2. With the camera located at the place designated "A" and "B" on the map Exhibit 16 is a correct photograph of the lake indicated by letter "K" and the arrowhead. With the camera placed at a point designated by "A" and "B" on the Plat Exhibit 17, would be a photograph of the lake as indicated by the letter "L" and arrowhead on said plat. Exhibits 6 to 17 inclusive are photographs of substantially the whole of the Goose Lake and correctly represent the conditions of the Lake on the 20th day of June, 1907.

Objected to on the part of the state as incompetent and immaterial and calling for a conclusion of the witness.

The defendant now offers in evidence Exhibit- Nos. 6 to 17 inclusive, the same being the photographs identified by the witness.

The State objects to the offer as incompetent and immaterial and not the best evidence, and as not being a true representation of the lake on June 20th, or at any other time.

32 EXHIBIT 6.

EXHIBIT 7.

33 EXHIBIT 8.

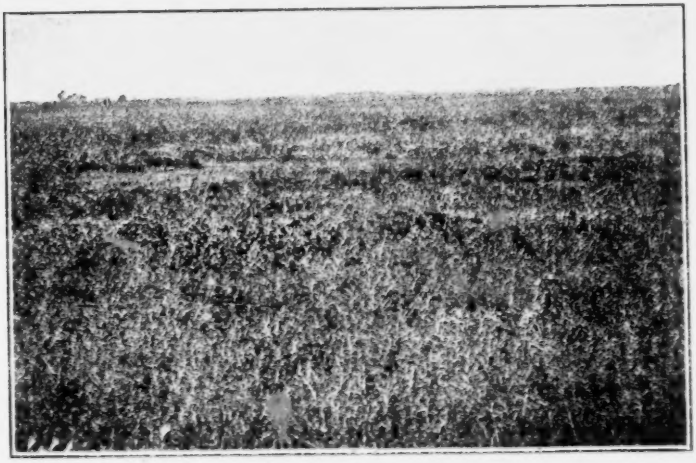
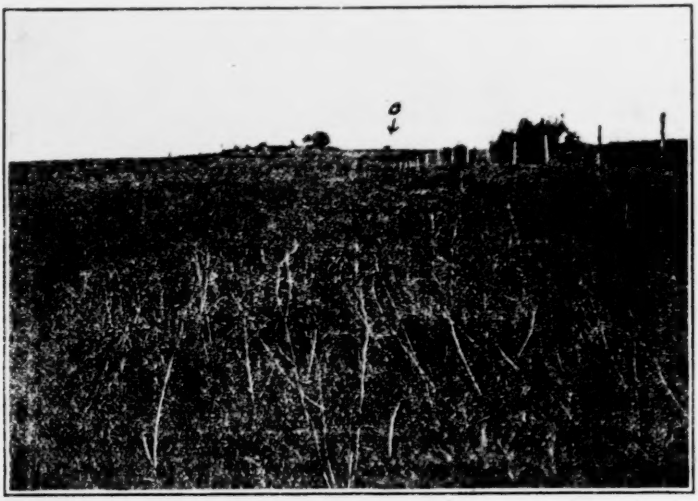


EXHIBIT 9.



34 EXHIBIT 10.

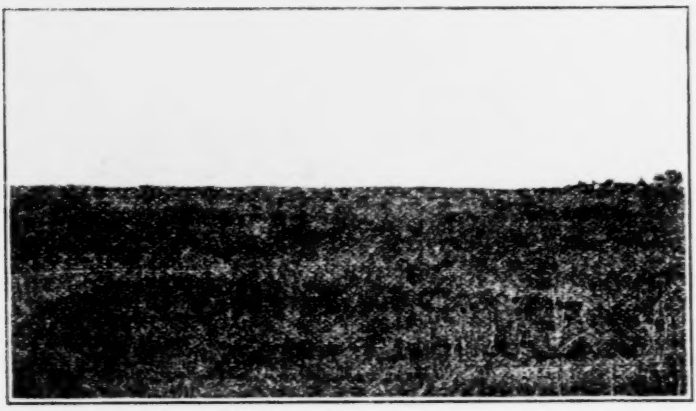
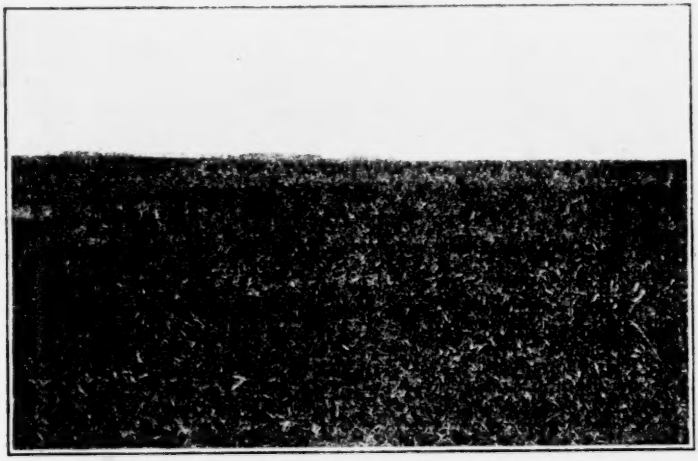


EXHIBIT 11.

35 EXHIBIT 12.

EXHIBIT 13.



36 EXHIBIT 14.

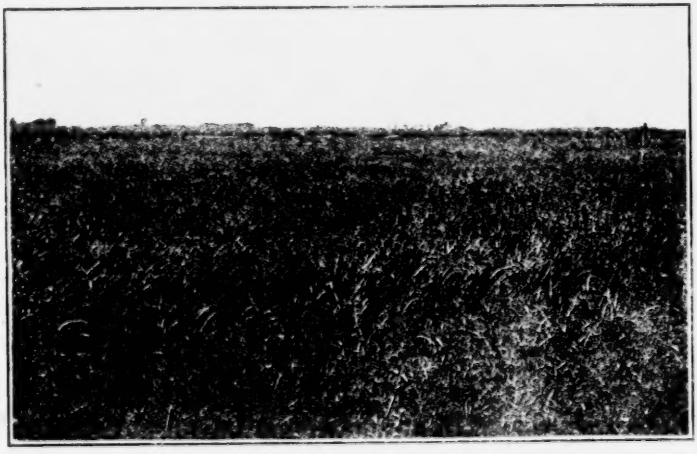
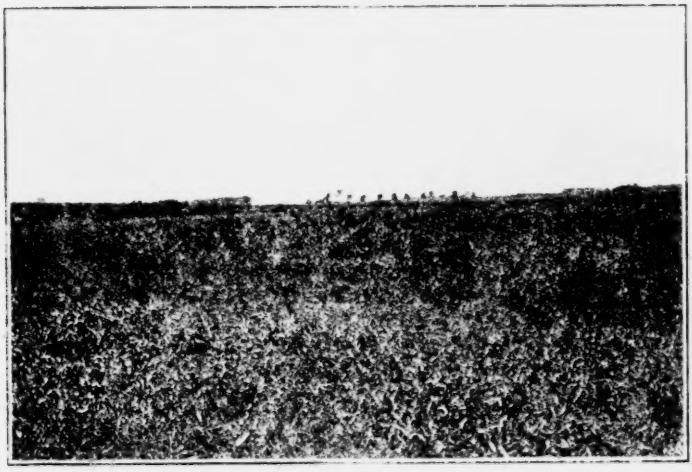


EXHIBIT 15.



37 EXHIBIT 16.

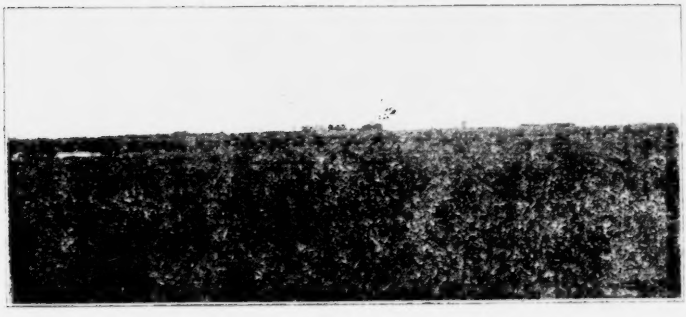


EXHIBIT 17.

Cross-examination by Mr. COSSON:

I was present when Mr. Evans, counsel for the plaintiff in this case, took these photographs. I stood and watched him. These buildings were a mile away—the ones you see in the distance. They are on the other side—a mile west and a mile north. The camera was pointed low down so as to get the land as close as possible. I could not say just how near. My best judgment is that the land is photographed a hundred feet away from where he was stand-
38 ing. I could not tell the scale of the photograph. The scale would not be uniform; it takes in the perspective the further away you get—the greater the scale. I could get a fair idea as to the character of the bank and the rim of the lake and the distance from the bed of the lake to the top of the bank, from looking at the photographs. I don't know whether other people could. I have been accustomed to seeing land photographed. I suppose there was about one-third of Goose Lake covered with water on the 20th of June, 1907. It was probably from five to three hundred feet to water from the meander line. I did not notice how far the water was from the meander line on the east side. I know, as a matter of fact, how far the water is now. Theodore Russell has about 60 acres. I know that it is under cultivation and has been for some time. That is on the extreme north part of it. There are 498 and 34-100 acres of land included within the meander lines of Goose Lake. I do not think you could tell accurately how much of the lake was covered by water by the photograph but no more so than from the natural eye. You can see the water out for a little ways and then the rushes hide it from the natural vision. There are places in the photograph where the water shows through. I could not tell from one of the photographs just what portion of the lake it is a photograph of unless I could get some point in the photograph to recognize from, that is—when I could get a house or a tree that I recognized. I could tell without the aid of the counsel if I

had the time to put them together. I identify Photograph No. 7 by the road. I could not tell if you obscure the trees and the fence. I have to have some point to look at. The photographs represent nearly the entire lake. There may be some omitted over on the north side. I could tell, the way he slanted the camera down, that it would have taken the water in the bed of the lake if there
39 was any water there. I did not look through the camera. Twelve snap shots were taken with the photograph.

It is admitted that the last five photographs were taken at a place designated on the map as "A-B." Nothing is admitted as to the manner but the camera was placed at the place.

G. W. Mattingly.

Examin*ing* in chief by Mr. Evans:

I am 62 years old; I reside in Jefferson, Greene County, Iowa; have lived here twenty-eight years; have known Goose Lake ever since I have been here; have been upon it or about it every year since I have been here; my business took me around it in different parts of it. I last saw it yesterday. I have hunted a great deal and fished some on the lake; when we would shoot anything we would push a boat or a raft out to get our game.

Same objection to the testimony of this witness, to each and every question, as to the testimony of the witness "Bean."

When I first saw the lake there was quite a body of water there. There was quite a growth of rushes and pond lilies during the summer season. As a general thing during each summer and fall the rushes grew to such an extent that they could be seen all over the lake. There would be some places of clear water in the middle at an early date, but not of late years. There used to be quite a channel on the south side where the water would run out when the lake was full during the heavy rains. You could swim a horse after the heavy spring rains, about sixty or seventy feet wide. When the country began to be broken up it began to recede. The lake has not been as large for a good many years—fifteen or sixteen. In 1892 or '93 we caught lots of fish there by spearing them. We
40 would go out in a boat made of boards. They could not get away from us. The next year it was practically dry—just a few little places with water in it. In 1895 or '96 it was practically dry. There was a fire set out to burn the rushes and vegetation and the peat caught fire and they had to shovel it off to put the fire out. They dug great holes down there three or four feet deep. There is practically no difference in the growth in the lake bed from what there was in an early day. There is no difference between the bed of this lake and Bullhead Lake down near Cooper. It has no value for public purposes so far as boating is concerned; people living near there have the benefits of the duck shooting. Judging from what I have known of the lake since I first saw it, I should say it was practically in the same condition now as it was in the year 1850. There

wouldn't be much difference twenty-eight years ago or fifty years ago because the drain was the same then. As soon as the land began to be broken up the lake began to go away; had less water in it.

Cross-examination by Mr. COSSON:

I should judge the land around the lake has been under cultivation fifteen to eighteen years. I don't think there has been any change in the lake by the soil washing in. The water would go away slow. I noticed yesterday the black soil down towards the water's edge. It was there when the lake began to go dry—the same kind of dirt was there then that there is now. I don't know anything about the lake prior to the time I saw it. My answer was just opinion or speculation. I don't know whether if the peat and vegetable loam were taken out that the lake would be fit for boating or not. On the south side and the northeast corner the banks are pretty well defined, but nothing else that I could see, that ap-
41 pears like a bank. There is one place on the northeast corner where the ground is gravelly. I am not interested in this suit; I am not a surveyor or a geologist; I have traveled around the country a good deal and used to fish and hunt a great deal and do yet, and I know all the ponds, creeks, bayous and draws; I attended a picnic at one time out there when the lake was very high; we couldn't cross the channel with a wagon because it would float the box off. I had heard about there being deep water out there and took particular pains that time to measure—went out in a boat. I got into an argument with some fellow who said there was twenty feet of water and the deepest place I could find was eleven feet. After the flood I should think it would be seven or eight feet deep. I went back and forth two or three times sounding it. I think the water now is from fifteen to twenty inches deep in places.

Jefferson Tolliver.

Examined in chief by Mr. EVANS:

I am fifty-five years old; my occupation is liveryman; I have lived in Greene County since my father came here in 1853. I was ten years old at that time. I have known Goose Lake since 1872; saw it every year or two.

Same objection to the testimony of this witness as to the testimony of the witness "Bean."

There is practically no difference in the lake now than when I first saw it except there was more water than now, and the growth or vegetation did not show from the fact that the water was deeper than now. In 1894 I went with some other parties and we pushed an old raft out into the water and killed bullheads with a paddle and poles that we were pushing the craft with. It was a warm
42 season and we didn't care for them. I don't know as the body of water has any particular public value. I don't know of anything it could be used for now. There has never been any

boat-riding upon it—nothing for pleasure particularly, only to row out and get ducks, fish and game. They always had some little skiffs there. The vegetation grew too large for a boat to get through as a rule.

Cross-examination by Mr. COSSON:

In the early days there was good duck hunting and fishing there. There would occasionally be patches of clear water where the boat could be moved around without interference.

Int. 12. What part of the banks of the lake is the highest and the best defined?

A. I should say on the south and west.

Int. 13. Oh, the south and west of the lake, how many feet is it from the bank of the lake—the upper rim, to the bed of the lake?

A. Well, you mean east? There the bank of the lake might have formed.

Int. 14. Yes, right along where the banks were well defined. The edge of the bank where the depression starts, how far from the top of the bank do you say it would be until you reach the bed of the lake?

A. I should say three or four feet.

Redirect examination by Mr. EVANS:

Q. Basing your answer upon what you have seen and known of the condition of the land around the lake, and the lake, and places where the lake would overflow during high water, I will ask
43 you to state whether or not, the condition which you have described when you first knew the lake must have been its condition in 1850?

Plaintiffs object, as immaterial and incompetent, and objects to the witness as incompetent.

A. I would not know anything to change it, except the natural filling up a little is all.

The prosecution further objects as calling for a conclusion.

Recross-examination by Mr. COSSON:

Int. 2. You would not pretend to say with any accuracy what the character of the lake was or the bed of it was in 1850?

A. I say, I don't know of anything unusual to change it from what it is now, except the natural filling up as all these do.

A. J. Morland.

Examined in chief by Mr. EVANS:

My name is A. J. Morland; I live at Jefferson, Iowa; am seventy-four years of age; I came to Greene County in 1853, and have lived here ever since.

Same objection to his testimony as to the testimony of the witness "Bean."

I first lived about five or six miles from Goose Lake when I first came here. I first saw Goose Lake in 1854; have not been there every year since, but have seen it a good many years; sometimes went traveling and hunting over it; went trapping on it in 1856, continued for ten or twelve years every year; there were quite a lot of muskrat houses all over the lake when I first saw it. When I went trapping I went over the lake on the ice; I never had
44 occasion to go over the lake in a boat; there was very little portion, if any, of the lake where there were not rushes growing up through the ice. That was true in the middle of it as well as the outside and it was true in the winter of 1856. I walked over it when it was dry in about 1860. You could see a little water and you could walk right across the lake. It was practically dry again in the year 1884. There was very little water about it. You could walk across the lake then, but you would have to wind around some of these low places where the water was. It was very nearly dry again in 1894. I last saw the lake on yesterday. There was not so much water in the lake the years when it was dry as it was yesterday; not so much in the year 1860 as there was yesterday; not so much in the year 1884 as yesterday; there was not so much in the year 1894 as there was yesterday. We burned the lake off then and the fire got down in the peat and they had to go into the ground to put it out. That was in the year 1894 and '95. When I commenced trapping there I could run a boat on the lake in the summer, but not very well after growth had grown up. The rushes and things were so big that you couldn't get through them. When I first knew the lake they called it a big swamp or a big pond. I remember when it got the name of Goose Lake. That was when the wild geese came in so thick; that was years after I first knew it. I also trapped at Bullhead Lake or swamp. There was no difference between the two as to the growth. Goose Lake was the bigger space.

Cross-examination by Mr. Cossox:

There is nothing now, so far as water is concerned, as compared to the year 1854 when I first saw it. I suppose it was six or eight feet deep with water in 1854. From that time until 1870 it
45 would raise and lower when wet weather came. I never knew of its being dry before 1860. I have seen boats on the lake; they went out there for trapping and hunting, not for pleasure that I know of. I was out there a good deal in the summer time. We would go out and hide ourselves in the rushes and get down where the elk could not see us, so we could raise a red flag and let them come and then we would shoot them. Generally speaking, the water's edge was out nearer the meander line in the early days than it is now. I think the banks of the lake were as high as an average man's head, that is, from the center of the lake—it slopes right down. I am not a civil engineer or a geologist, or an expert in any way. My opinions are based upon the experience of myself.

Redirect examination by Mr. EVANS:

I meant, when I said the lake would be six or seven feet deep, that that would be in the spring; there would be a difference of three or four feet in the depths of the water between the spring and fall. It would be that much lower in the fall, and that was true of every year unless it would be a wet season.

George W. Strait.

Examined in Chief by Mr. EVANS:

I am a carpenter; seventy-eight years old; live in Jefferson; have lived here for twenty-nine years. I formerly lived up near Goose Lake, in about five miles of it. I saw the lake several times every year for a number of years; would go there in the fall to a sorghum mill. I never saw any very clear water over the lake; it was grown up with growth. I have forded the channel when the water was running out; it was about sixty feet across and the water
46 would be about knee deep. There would be no water running in the fall. The lake would be a couple of feet higher, I should judge, in the Spring than in the fall. It was of no practical value to the public as a body of water.

Cross-examination:

The land all around Goose Lake is high except that near the outlet. I first saw the land in 1878. When I first saw it it was not very far from the top of the bank of the lake to the water's edge. I think the lake was from five to six feet deep but I never measured it. I don't think there were ever any spots there that was clear water; there might have been, but I didn't notice it. There was one boat there in 1878. There might have been two, but I don't know it. I only knew of one. In 1894 I drove right along the side of it on the east side clear around to the south side and I didn't see any water in it. I don't know whether it has been dry at any other time since I knew it or not.

Act of Congress of 1850.

The defendant offered in evidence the act of Congress of September 28th, 1850, commonly known and spoken of as the "Swamp Lang Grant" found in Statute 9, Page 519.

Act of the Iowa Legislature.

The defendant offered in evidence the Act of the Iowa Legislature granting the swamp lands in various counties in the State of Iowa to the several Counties, the same being recorded in Miller's revised Code of Iowa at Section 925, Page 1170.

Objected to as incompetent, immaterial and irrelevant.

47 *Deeds from Greene County to the American Immigrant Company.*

Defendant offered in evidence the record of deeds of Greene County, Iowa, Book "H," Page 34, being a deed from Greene County, Iowa, to the American Immigrant Company, conveying all the swamp lands situated within Greene County.

Objected to as incompetent, immaterial and irrelevant.

Decree of Court.

The defendant offered in evidence the record of the decree of the District Court of Greene County, Iowa, confirming the deeds recorded in Book "H," page 34, which deed was dated September 7, 1863, the decree being dated, September 2, 1865, and recorded in Book 37, page 339. The decree enjoined Greene County from claiming any part of the swamp land in said county.

Deed from the American Immigrant Company to James Callanan and J. C. Savery.

The defendant offered in evidence the records of Greene County, Iowa, Book 37, page 229, the same being a deed from the American Immigrant Company, to James Callahan and James C. Savery, conveying all the swamp land in Greene County, Iowa.

Deed from Savery to Callanan.

The defendant offered in evidence the deed from James C. Savery to James Callanan, conveying all swamp lands in Greene County, which deed is dated September 17, 1885, filed for record November 25, 1893, offering the record of said deed as recorded in Book —, Page —.

48 *Deed from Calleman to Fuller.*

The defendant offered in evidence the deed of James Calleman to E. P. Fuller, conveying the lake bed in controversy, together with other lands, dated April 15th, 1895, the same being marked Exhibit No. 18.

Deed from Fuller to Lehman.

The defendant offered in evidence the record of Book 46, page 347, of Greene County records, the same being a deed *to* E. P. Fuller and wife to George H. Lehman for the land in controversy.

Deed from Lehman to the Marshall Dental Mfg. Co.

The defendant offers in evidence the records of Greene County, Iowa, book 46, Page 484, being a record of the deed of George H. Lehman, to the defendant, the Marshall Dental Manufacturing Company.

The state objects to the introduction of each and every one of these exhibits offered for the reason that the same are incompetent, immaterial and irrelevant, and the defendants are seeking thereby to overthrow the decision of the Land Department and assail the findings of the Secretary of the Interior with reference to the land and the lake in controversy.

Mr. Cosson: The State offers in evidence Exhibit "A," being a decision of the Secretary of the Interior with reference to the lake in controversy, and his finding refusing to order a resurvey and determining in so far as that department was concerned that the land in controversy was at the time of the original survey a lake proper to be meandered.

49 EXHIBIT A.

In re Application of MARSHALL DENTAL MANUFACTURING COMPANY, Grantee of Greene County, Iowa, for Survey of Lands.

The Commissioner of the General Land Office.

SIR: With your office letter of October 27, 1903, you transmit the application, and accompanying papers, of the Marshall Dental Manufacturing Company, grantee of Greene County, Iowa, for the survey of a body of land alleged to be swamp and overflowed, but which is designated upon the township plat of survey as a meandered lake, in sections 6 and 7, T. 84 N., R. 30 W., and Sections 1 and 12, T. 84 N., R. 31 W., known as "Goose Lake."

The field notes of survey show that there was a well defined lake covering the area indicated, at the time of the township survey in 1853. The only witness who testifies as to the condition of the land at the time of the survey is C. L. Davis, who testified that he was a flagman with the surveying party when the land was surveyed in 1853, although his name does not appear in the returns. The only assistants to the surveyor who appear from the returns to have taken the oath as required by the Manual are Joseph L. Johnson and David Buttrick, Chainman, H. C. Caldwell, Marker, and A. F. Crowel, axeman. He testifies that he remembers a stake was driven, and a mound made at the S. E. corner, of Section 6, about two or two and a half rods from the water's edge at that time. That the surveyor instructed him not to go too near the water so the chainman would have a better place to walk in going around the lake, as the ground was marshy near the water. That at the time of the survey
50 the majority of the unsurveyed tract was a marsh. He describes it as a marshy reedy lake, inhabited with muskrat and

in the summer time nearly dry. The returns of the survey show that the deputy found many marshes in surveying the township which are distinctly noted. In running the section lines that intersect the shore of the lake, he entered marshes, but always left the marsh and entered higher ground before reaching the shore of the lake, which is always described, as low, flat and marshy, and where he always set his meander post in a mound of earth and sod. It is possible that on account of the low marshy condition on actual rim of the lake, and for greater security against the destruction of the monuments, he did not set his meander post immediately at the water's edge but upon higher ground. So that the testimony of Davis that the meander post at one point was not placed at the water's edge and that the ground near the water was marshy, may not as to those facts be inconsistent with the returns. It is not shown that in running the meander the deputy did not delineate the lake substantially as it actually existed.

In the general description of T. 84, R. 31, he says:

This township contains some small marshes which are unfit for cultivation; also a lake in the N. E. Corner, banks low earth. The surface on margin of lake low and flat; unable to examine the depth of the water in lake owing to growth of flag bushes and willows on its margin.

Other witnesses who testify as — the condition of the lake several years after the survey characterize it generally as a marshy pond full of reeds, rushes and flags, with a great many muskrat houses among them. None of these witnesses speak definitely of the condition of the lake at the time of the survey or at any period so near to it as to indicate with reasonable certainty the exact condition of the lake, when it was surveyed. H. W. Bean who made a
51 survey of the lake in 1895 with a view to obtaining an outlet for thorough drainage testified that he found in the lake a vegetable mould and black loam about thirty inches deep at all points, interlaced by a strata of sand from one to six inches deep, except at one place where there is a strata of sand and gravel 22 inches deep resting on a subsoil of blue clay.

All of the witnesses testify that the lake has no outlet, that it is a depression in the prairie forming a basin that is fed by the melting snows and rains, thus corroborating the returns of the survey that it had a well defined rim. There is no sufficient testimony to impeach the correctness of the returns, but on the contrary, the testimony of the several witnesses considered in connection with the returns of survey rather indicate that the bed of the lake has been gradually filled up since the date of survey, probably because of the cultivation of the surrounding lands, causing the deposits into the lake of the vegetable mould and black loam, covering the strata of sand and gravel as found by witness Bean.

One of the principal grounds as urged in support of the application is that the present condition of the lake bed is a menace to the health of the neighborhood, and that it would be a great benefit to the community living around it if the land could be certified to the State under the swamp land act for the benefit of its grantees so that

the land could be drained and [illegible]le subject to taxation. There is with the record, a petition signed by a great number of citizens urging such action.

There is submitted with the application here a letter from the Governor of the state requesting that such action may be taken by the Department upon this application as may result in a speedy and final determination of the claim of the State and of all persons who may assert any right, title, or interest in or to said lands or
52 any part thereof. The Governor does not waive any claim or right of the State to assert its claim in any investigation, or proceeding, judicial or otherwise, that may be had in the Department or in any court. The State is therefore in this proceeding asserting its right to said lands by virtue of its ownership of the beds of all lakes within its borders that were properly meandered.

If at the time of the survey there was a well defined lake that was properly meandered, as shown by the field notes of survey, the Department would have no authority to convey the lands as public lands, or to certify and patent them to the State under the act of September 28, 1850. The title to the bed of all lakes that were properly meandered, vested in the State by virtue of its sovereignty and no reason can be perceived why the State cannot assume control of this land, and reclaim it by drainage or make any other disposition it may see proper in view of this decision holding that the lake bed is not public land left unsurveyed. Counsel contend that lake beds of the character of the one in controversy will be without legal ownership and not subject to State control until the Department determines the character of the land, and as authority for this contention cite the case of Iowa vs. Reed, 187 U. S., 87. Their contention is evidently predicated upon the theory that the survey was erroneous and that the State, by virtue of its sovereignty, acquired no title to lakes, or ponds which at the time of the survey could have been easily drained or were likely to dry up. The proposition will not be disputed, but no principle was announced in the case cited adverse to the contention of the State that it acquired title by virtue of its sovereignty to the beds of all lakes that were properly meandered and upon which the surveys of the public lands were closed.

It is therefore only a question as to whether the body of
53 water that was meandered as a lake was of such permanent character as to justify the meandering of it as such and to segregate it from the body of the public lands, or whether it was erroneously made, and that question must primarily be determined by the land department.

"The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government and the land department, charged with the duty of surveying the public lands subject to survey and disposal, under the public land laws." Kirwin vs. Murphy, 189 U. S. 35, 54.

But after the land department has disposed of the question, if the legal rights of any party have been invaded, he may seek redress in the courts, which have jurisdiction to determine whether any

lands surveyed and disposed were public lands and to determine who has the better right to the title.

In Iowa vs. Rood, the land within the meander line of a lake, had been patented to the state under the swamp land act and the plaintiffs below (Rood et al.), claimed under that patent. The State claimed that upon its admission to the Union it became the owner of all lakes within its borders, subject to the right of the public to use the same and that the title to the beds of such lakes was in the State, and that the action of the government surveyors in segregating the lake, from the public lands by meander lines was a determination by the government by its duly authorized agents that the lake so segregated and set apart, was the property of the State and not a part of the public domain. The Court dismissed the appeal of the State for the reason that its title, by virtue of its sovereignty did not involve the validity of any treaty or statute of the United
54 States, or the constitutionality of any statute or authority, and hence presented no federal question. It also decided adversely to the contention of the State that the segregation of the lake by the public survey, and the approval thereof, determined anything as to the title of the land beneath its waters.

"The Land Department must necessarily consider and determine what public lands, what lands have been surveyed, what have been disposed of, and what are reserved." Kirwin v. Murphy, supra, 53.

Under such authority the Department has power to correct surveys upon a proper showing, but as has been frequently said the proper rule is to refuse to disturb the public surveys, except upon the clearest proof of accident, fraud, or mistake, where a resurvey may affect the rights, or claims of any one resting upon the original survey. As no sufficient proof has been submitted to impeach the correctness of the survey attacked here, the application is denied, thereby determining so far as lies in the power of the Department, that the lands in controversy are not public lands.

In this connection it may be well to call attention to the decision of the court in Railroad Company v. Smith, 9 Wall., 95, holding that in a proceeding before the courts, it is competent to prove by witnesses who know the land that it was swamp and overflowed land within the meaning of the swamp land grant. In French v. Fyan, 93 U. S., 169 oral testimony was offered to impeach the validity of a patent to lands under the swamp land grant by showing that the lands were not in fact swamp lands, relying upon the authority of Railroad Company v. Smith. The court rejected the testimony, holding that the issuance of the patent was conclusive of that question. The decision of the lower court was affirmed upon the ground that the act making the grant confers upon the Secretary of
55 the Interior the power to determine what lands were of the description granted by the act and made his office the tribunal whose decision on that subject was to be controlling. It was held that the decision in Railroad Company v. Smith was not in conflict with that principle and that parol evidence was held in that case competent to prove the character of the land *because the Secretary had refused to make a selection or list of such lands and would issue no patent. The court said there was no means by which it could*

compel the Secretary to act, "or if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to perform his duty." If the doctrine announced in Railroad v. Smith can be applied in any case, it surely must apply in this so that the grantees of the State are not remediless because of the refusal of the Department to survey the land.

The papers are returned herewith.

Very respectfully,

(Signed) E. A. HITCHCOCK, *Secretary.*

Mr. EVANS: The defendant offers in evidence Exhibit "19" the same being a certificate of the acting commissioner of the general land office, under date of October 12th, 1906, certifying that the annexed copies or papers received with the letter dated September 12th, 1903, from the Register at Des Moines, Iowa, relating to the application of the Marshall Dental Manufacturing Company for a survey of the land in controversy, together with the attached copies, the same being copy of the letter from the Register of the Des Moines Land Office, under date of September 1st, 1903, and copy of the application of the Marshall Dental Manufacturing
56 Company for a re-survey, and a copy of the abstract of title to the land in controversy and a copy of the petition of E. G. Albert and others, to the Commissioner of the General Land Office and a copy of the entire petition of W. S. Irving and others to the Commissioner of the General Land Office and a copy of the affidavit of A. R. Mills, W. D. Osborne, C. L. Davis, James Outrin, H. L. Mecum and C. W. Way.

The State objects to this offer as incompetent, immaterial and irrelevant, and hearsay, and is not the best evidence; not tending to purport any issue made by the pleadings in the case, part of the exhibits being some affidavits of persons since dead, and there being no opportunity to cross examine.

For the further reason it is an attempt to assail the finding of the Land Department and the Secretary of the Interior in a collateral proceeding.

Mr. EVANS: The Exhibit No. 19 with the said papers attached together with Exhibits 2, 3, 4 and 5, also attached to Exhibit No. 19, are offered as a part of the record upon which the decision Exhibit "A" is based.

EXHIBIT 19.

DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., *October* 12, 1906.

I hereby certify that the annexed copies of papers received with letter dated September 21, 1903, from the Register at Des Moines, Iowa, relating to the application of the Marshall Dental Manu-

facturing Company for the survey of certain lands in T. 84, N., Rs. 30 and 31 W., Iowa, are true and literal exemplifications of
57 the originals on file in this office.

In Testimony Whereof I have hereunto subscribed my name, and caused the Seal of this Office to be affixed at the City of Washington, on the day and year above written.

G. F. POLLOCK,
Acting Commissioner of the General Land Office.

UNITED STATES LAND OFFICE,
DES MOINES, IOWA, *September* 21, 1903.

Honorable Commissioner General Land Office, Washington, D. C.

SIR: I transmit, herewith, the application of the Marshall Dental Company, for the survey of certain lands in township 84, Ranges 30 & 31, W. 5 P. M., Iowa, together with the petition of various citizens of Greene County for said survey, and an affidavit of the County Surveyor, and plat of said tract known as "Goose Lake"; also an affidavit of various parties as to the character of said tract — making four (4) enclosures, filed in this office September 8, 1903.

Very respectfully,

THORNTON S. HOWARD,
Register.

W. R. B. 24-1151.

Before the Honorable Commissioner of the General Land Office.

Acting Surveyor General of Iowa, Washington, D. C.

In the Matter of the Application of the Marshall Dental Mfg. Co., a Corporation, being the Grantee of the State of Iowa and Greene County for the Lands Hereinafter Described.

58 Comes now the Marshall Dental Mfg. Co., and shows the Honorable Commissioner as follows:

That the Marshall Dental Mfg. Co., is a corporation duly organized and existing under the laws of the State of Iowa.

That it is the grantee by certain mesne conveyances of the State of Iowa and Greene County for certain unsurveyed lands situated in Sections 6 and 7 of Range 30, and Sections 1 and 12 of Range 31, all in Township 84, west of the 5th P. M., in Greene County, Iowa. That by reason of said conveyances, your petitioner is now the owner of certain unsurveyed land and has succeeded to all the right, title and interest of the State of Iowa under the swamp land grant of September 28, 1850.

Your petitioner further represents that there is a large body of unsurveyed land in Sections 6 and 7 of Range 30, and Sections 1 and 12 of Range 31, all in Township 84, west of the 5th P. M., in Greene County, Iowa; that said land is situated in and is a part of what is known and designated on the government plat and by the government survey to be a lake of water, but your petitioner

alleges that, as a matter of fact, there never was a lake of water on said sections, and that the meander lines as set out by the government survey and as shown by the government plat is an absolute mistake; that there is not now and never has been any lake on said sections of land upon which to base the meander lines as run by the government surveyor.

Your petitioner further alleges that from the configuration of said land, there is not now and was not at the time of the government survey any reason or facts that could possibly be construed as justifying the meander lines as established by the government survey, and that said lines and survey are wholly and unqualifiedly wrong and that the lines established by the government
59 survey are so surely wrong as to leave no doubt but what a fraud has been perpetrated on the government by a failure to survey a part of the public domain; thus depriving the government of a part of her revenue and depriving her citizens of the right to acquire title to a part of the public domain.

Your petitioner further represents that said land instead of being a lake proper to be meandered under the rules and regulations pertaining to government surveys, was and is in its natural state swamp and overflowed land within the meaning of the act of September 28, 1850; that whatever water has been on said land has been of a surface character, caused by the rain and snow fall; that there is no inlet or outlet to said alleged lake; that the land is now and always has been easy of drainage; and that in every year the water which accumulates on said land almost entirely subsides, leaving much of said land fit for pasture, and that such was its condition on the 28th day of September, 1850.

Your petitioner further represents that the equitable title of said land passed to the State of Iowa under and by virtue of the swamp land grant of September 28, 1850; that the State of Iowa by act of its General Assembly, approved January 18, 1853, granted said land to Greene County, being one of the counties of the State of Iowa; that thereafter, said Greene County disposed of the said land as swamp land, and that the greater portion of said land, by certain mesne conveyances, became and is now the property of your petitioner.

Your petitioner exhibits herewith, as a part hereof, an abstract of title, showing the derivation of its title; also a plat of said land made by and from a survey by H. W. Bean, county surveyor of Greene County; also presents herewith a petition of the county officers of Greene County, together with other citizens and es-
60 specially those citizens residing in the immediate vicinity of said land, petitioning your honor to cause the same to be surveyed as provided by law.

Wherefore, Your petitioner respectfully prays that the necessary steps be taken to procure a patent for said tract of land from the general government of the State of Iowa under the act of September 28, 1850.

Petition.

Commissioner General Land Office, Washington, D. C.:

We, the undersigned petitioners, residents of Greene County, State of Iowa, living near the unsurveyed tract (erroneously called a lake), in Sections One (1) and Twelve (12), Range Thirty-one (31), and Sections Six (6) and Seven (7) Range Thirty (30) Township Eighty-four (84) North, request you to certify this tract up to the State as swamp land, under the Swamp Land Grant of September 28th, 1850, so that the grantee of the State may drain the same for the following reasons:

First. It would be a great benefit to the surrounding region around this tract, on account of health, as it is a marshy and malarial swamp.

Second. It would be a great benefit to all the lot owners, adding ten to twenty per cent to the value of their farms, in having this tract drained.

Third. It would be a great financial benefit to Greene County to have this tract drained so it could be surveyed, platted, and put on the Assessor's book, and bear its share of the taxes.

Fourth. This tract in its present condition is useless and of no value, and with proper drainage would add to the material interests and advancement of Greene County.

61

E. G. Albert.	James Outtrim, Dawson Tp., Sec. 31, Greene Co., Ia.
F. Q. Vanpelt.	
Jno. McLennan.	J. M. Forbes, Att'y at Law.
J. S. Caskey.	L. S. Lyon, Harness Mfg.
F. J. Harned.	B. F. Wayt, Marble Dealer.
S. C. Kirby.	Park L. Cockerill, Real Estate Ag't.
K. M. Benson.	G. S. Tolixer, Att'y at Law.
M. Baker.	J. A. Gallaher, Att'y at Law.
Thos. Dobbin.	Jacob Winkelman.
Wm. Reinbaum.	A. S. Yillilang, Jefferson, Ia., 6 miles from Lake.
S. C. Maynard.	
W. H. Kettell.	Joseph Lampman, County Recorder.
E. P. French.	E. N. Martin, Jefferson.
Thos. P. Stubbins.	J. J. Russell, Jefferson.
Thos. Goodwin.	H. W. Bean, Co. Surveyor.
C. L. Joy.	W. E. Jenison, Co. Supt.
H. P. Getz.	Lee Davis, Co. Auditor.
Jacob Johnsen.	S. S. Rutter, Clerk of the Court.
H. E. Drofate.	D. L. Howard, County Treas.
J. W. Varner.	J. W. Fitz, Cl'k.
G. W. Bleakney.	J. N. Huntington, Cashier Jefferson Savings Bank.
F. A. Strayer.	

JEFFERSON, IOWA, *May* —, 1895.

To the Honorable Commissioner, G. L. O., Washington. D. C., Greetings:

We the undersigned petitioners, residents of Greene County, State of Iowa, living near and adjoining That unsurveyed tract "known as Goose Lake", being parts of sections 1 and 12, range- 31 and 6 and 7, range 30 all in Township 84, N. ask your Honorable Sir; that this unsurveyed tract be certified to the State of Iowa, as Swamp Land; under the Swamp land grant of 1850. So that the State or its grantees may drain the same, for the following reasons:—

62 First. It would be a great benefit to the surrounding region around the Lake on account of health.

Second. It would be a great benefit to all the Lot owners adding ten to twenty per cent. to the value of their farms in having said Lake drained.

Third. It would be a great financial benefit to Greene County, to have the Lake drained; so it could be surveyed, platted and put on the assessors books and be assessed, and be made to bear its share of taxes;

Fourth. The Lake in its present condition is useless and of no value, being marshy, and unhealthy.

For the above reasons we pray your Honorable Sir will take immediate action on it:—

W. S. Irving, R. Anderson, J. J. Smith, C. E. Luther, G. S. Clipperton, C. L. Underwood, C. W. Elder, J. W. Sims, John H. Sims, J. M. Bulard, Lewis Heller, J. W. Ladd, J. E. Delphine, G. H. Basquires, J. McLain, F. A. Johnson, C. S. Ginger, J. T. McGrath, N. L. Russell, Tom Canfield, E. L. Ferguson, W. B. Hooker, Geo. M. Thomson, J. C. Thompson, W. E. Riggs, B. Baddley, I. Sanderson, Chas. Benson, W. H. Renner, O. V. Blaylock, O. W. Lowry, Jas. M. Steele, Jas. A. Warf, James Thompson, H. J. Cunningham, Daniel Maloney, W. W. Furner, Frank Critlin, J. P. Davis, Thomas Dueer, P. J. Harvey, C. C. Metzger, C. W. Smith, J. H. Locke, F. T. Leisure, C. J. Bowling, C. L. Renner, J. R. Thomas, J. H. Powers, A. J. Harvey, Daniel Embree, Wm. Keer.

63 *Hearing Continued Before the Court September 2d, 1907, at Which the Following Proceedings Were Had.*

EXHIBIT "A" 1.

The defendant now offers in evidence Exhibit "A" 1, being the testimony taken by agreement of the parties on the 21st day of June, 1907.

Instructions to Surveyors.

The defendant also offers in evidence the instruction to surveyors in force at the time of the survey of the land in controversy was

made in 1853 as follows, to-wit: "You are also to meander in manner aforesaid, all lakes and deep ponds of the area of twenty-five acres and upwards; also navigable bayous. Shallow ponds readily drained or likely to dry up are not to be meandered."

Field Notes.

The plaintiff now offers in evidence a certified copy of Field Notes of the United States Government survey of the meander lines of the area known as Goose Lake, situated in Section 6 and 7, Township 84, Range 30, and Sections 1 and 12, Township 84, Range 31.

Objected to as incompetent. No objection made that it is not the original.

EXHIBIT "B."

Township No. 84 North, Range 30 West, 5th Meridian.

Meanders of a Lake in Sections 6 and 7, Beginning at Meander Post in Township Line Between Sections 7 and 12, Ranges 64 *30 and 31, on South Side of Lake, Thence in Section 7.*

Course.	Chains.	Variation 10 degrees East.
N 55 E	12 50	
N 41 E	9 00	
N 25 E	5 00	
N 4¼ W	5 67	Intersect meander post on east side of lake between sections 6 and 7.

Thence in section 6.

N 6 E	11 00	Variation 12 deg. 5′ East.
N 6 W	11 50	
N 50 W	10 00	
N 55 W	9 50	
N 20¾ W	5 77	Intersect meander post on the township line north side of lake between sections one and six ranges 30 and 31.

MAY 10TH, 1853.

Township 84 North, Range 31 West, 5th Meridian.

Meanders of Lake in Sections 1, 6, 7, *and* 12, *Beginning at Meander Post West Side of Lake on Township Line Between* 1 *and* 36, *Townships* 84 *and* 85, *Thence in Section* 1.

Course.	Chains.	Variation 10 degrees East.
S 20 E	6 50	
S 45 E	3 50	
South		
S 30 E	8 00	
N 83 W	12 00	
S 25 W	6 50	
S 15 E	4 00	
S 50 E	7 50	
S 33 E	12 00	
S 10 E	4 50	
S 13 W	4 50	
65		
S 32 E	8 50	
S 1 W	7 50	
S 21 W	7 50	
S 1 E	6 00	
S 8 E	4 00	
S 13 E	5 62	Intersect meander post on south boundary of section 1 west side of lake.

Course.	Chains.	From meander post between sections 1 and 12 thence.
		Variation 8 deg. 30′ East.
S 30 E	5 00	
S 51 E	6 00	
S 69 E	10 00	
S 44 E	8 00	
S 45 E	9 50	
S 72 E	5 50	
		South side of lake.
N 77 E	6 50	
N 77½ E	2 82	Intersect meander post on township line south side of lake between sections 7 and 12, ranges 30 and 31. Bank of lake low and flat. From meander post on township line between sections 1 and 6, township 84, north ranges 30 and 31 west, thence in section 1.

Variation 10 deg. 10′ East.

N 40 W	5 50	
N 8 E	8 50	
66		
N 34 W	11 50	
N 70 W	6 00	
N 37 W	16 50	
N 25 W	12 00	
N 47¾ W	3 85	Intersect meander corner on township line north boundary of section 1 shore of lake flat and marshy.

MAY 10TH, 1853.

EXHIBIT "C."

NOTE.—Exhibit "C" is substantially the same as the defendant's Exhibit- 1 and 2 on page — of this abstract.

A. S. GILLILAND, witness for the State, examined by Mr. COSSON: I live in Jefferson; have lived here since 1857 and have known Goose Lake since 1874; I first saw it in 1860, but was not there any more until 1874. From that time until 1887 I saw the land lots of times each years. I was fishing and hunting all of that time. I wouldn't be able to say how deep it was in 1874. Between 1874 and 1886 there was one place we called the deep hole, probably ten or twelve feet deep in the hole. We used to pole our boats. We had a pole that was probably ten or twelve feet long and it would go down in the mud a little. I think the water was six or seven feet deep, somewhere about that. I was upset a time or two about 1880 and could not touch bottom without going over my head. It was not in the deep hole that I upset the boat; I could touch bottom but it was over my head.

Q. How much of the water in the lake was clear during the years 1874 to 1880?

A. I would not be able to say exactly, possibly close to it, there must be over six hundred acres in the lake, and the point
67 the rushes went out, up on the east side and towards the north end and went out a third of the way across and probably, I should say, ten rods wide, and then just once in a while a few rushes would come up just a little above the water, then there would be lots of clear water and once in a while some of these little rushes would come up just above the water.

Q. Was this true generally through the year?

A. I wasn't there only in the fall of the year and in the spring of the year.

Q. During the fall of the year was this true generally?

A. Yes, at any time I was there. I was only there in hunting seasons in the spring and in the fall.

Q. Describe, to your best judgment, what fractional part of the

lake would you say was covered with clear water—two-thirds—three-fourths—?

A. No. Yes, I would say two-thirds anyway, it is pretty hard to answer that question, there was a big body of water there.

On the south it was kind of sandy bottom and when you got further up it was pretty muddy. We could easily push our boats with poles in place of using oars. I do not know about the lake now, have not been there but once since 1888. I saw it one time after they said it had gone dry. I drove up to look it over. There wasn't much water in it—it is what they call dry here. The rushes and vegetable growth were much heavier and thicker then. I never got any very large fish.

Cross-examination:

I mean by clear water in the lake the places where the rushes did not grow up out of the water. I don't know whether the rushes were growing in fact, in the places where the clear water
68 was. It was a little higher in the spring than in the fall. The water must have been more than six feet deep, for I am about six feet tall, when we used to pole ten or twelve feet and it used to be six feet deep, I think, of course the pole would go down some in the mud. I do not know of any time from 1874 to 1887 when the lake would appear to be dry in the fall of the year.

H. B. Heath, witness for the State, examined by Mr. Cosson:

I live out near Goose Lake in Greene County, Iowa, and have lived there since the spring of 1883. I moved to Greene County in that year; I fish and hunt a good deal; I lived about a mile and a quarter from the lake, when I first knew the lake I presume there was from seven to twelve feet of water in it. There was a gradual overflow at the outlet most of the time; the water at the outlet was three feet deep for several years after I came there. I should say that there was at least three-fourths of the lake clear water when I first seen it. I think the dirt had washed out in the lake around the edges. The lake had fallen several feet when I last saw it about a year ago. The water was gradually diminished. I was in the water when I was hunting, it was about seven feet deep, but I wasn't in where it was the deepest. I dug in the bottom of the lake when they were surveying it; there was about fourteen inches of decayed mould on top and then you came to four or five inches of gravel—course gravel, and under that was a whitish substance, a kind of a clay. I think it was in 1900 that we were fencing it, or surveying it, when the digging was done.

69 Cross-examination:

The last time I saw the lake the biggest portion of it was grown up to rushes; the lake flowed all during the year when I first knew it. I think the melting of the snow and the spring rains did not have a great deal to do with the depth of the lake from the fact it would run off when it got so full. I do not think there was any perceptible difference in the amount of rushes that was there the

first year I was there between the spring and fall. I don't remember any years in the early days when the lake would flow out in the spring when it did not in the fall.

L. DIAMOND, witness, called on behalf of the State, examined by Mr. COSSON:

From 1869 until twelve years ago I lived a mile and a half of Goose Lake; have lived in Jefferson since. I saw Goose Lake quite often every year during the earlier years; I never measured the water in the lake but think it was from ten to twelve feet deep. There is not near so much water in the lake now as there was in the earlier days. I should think a good three-fourths of it was covered with clear water in the earlier days; I fished there lots of times. It has good banks.

Mr. EVANS: Objected to the question and moved to strike the answer out as a conclusion.

I have driven over the outlet many times when the water came up in the wagon box; there was another outlet further north; I wasn't up there at the time much and I don't know so much about the outlet, but the inlet. I don't know from my own knowledge whether there was a general overflow or not. I did not notice.

70 Recross-examination:

I wouldn't say as to whether there was any very great difference between the amount of water in the spring and the fall. I wouldn't be positive; there might be more rushes in the fall—I wouldn't say, but I think there was a good three-fourths of the lake clear in 1869—I mean no rushes in it, they run boats there, sail boats. I don't recall the dry season of 1870; the lake was not dry in 1869 or 1870 that I know of.

HARRY W. THOMPSON, a witness in behalf of the State, examined by Mr. COSSON:

I live at Grand Junction, am a civil engineer; been in the business five years, was assistant for five or six years previous to that. My father is a civil engineer; I made a survey of Goose Lake July 2d this year, I only seen it one other time aside from the time I made the survey, that was five or six years ago, when I drove past the end of it. Mr. Frank Heller, his father and Mr. Mason were wth me when I made the survey; we took levels and chains in order to make profiles at the point of overflow and at five other points around the bank of the lake. The first point, the point we considered the point of overflow, is just south of the quarter line of Section 6-84-30. I made a profile showing the elevation and contour of the land. Station "O" of profile No. 1 is the point of the overflow. I made the bottom of the lake 100 feet above datum. At the point of overflow the banks were eight feet and eleven hundredths. Station 1 is eight feet and twenty hundredths but this is on the bank, this artificial drain, and it is slightly higher. The elevation of the bank is about one per cent from the water's edge to

the point of overflow, that is one foot for every hundred feet. Profile No. 2 shows the contour of the bank about thirty rods south on the north quarter of the quarter line. Starting from the
71 water level out, every ten feet there is a rise in the elevation of the bank one foot. At station No. 2 the elevation of 14.36. These different levels and profile numbers are designated on Exhibit "1". Profile No. 4 was made about ten miles north of the Section line between Sections One and Twelve-84-31. The elevation of the bank at station 2, or one hundred feet back from the surface edge of the water is 14.26 above the bottom of the lake and the angle of the bank at that point was about ten per cent.

Q. You call that No. 2, you mean No. 4 instead of 2.

A. Station 2, Profile 4. Profile 5 was taken at the south west part of the lake, on Section Twelve-84-31. The elevation at station 2 on this profile is 113.57, or thirteen feet and fifty-seven hundredths above the bottom of the lake. Section profile 6 is taken on the Section line between Sections 6 and 7, 84-30, and the bank is not so abrupt here. One hundred seventy-five feet back, or at station 2 plus 75 feet the elevation is 109.57, that is seven feet and fifty-seven hundredths above the bottom of the lake. This is one place where the banks are much lower than others. And that elevation *is* 175 feet back from the water's edge is nearly a foot and fort*h* six hundredths higher than the overflow point.

Q. What was the general depth of the water at the time you made these elevations and soundings?

A. It varied greatly. The greatest depth was four feet and eighty hundredths. There was——.

Q. And at what point was that?

A. In the north center part of the lake, just north of the central part of the lake. From perhaps two hundred feet back from the water's edge the water would average about four feet. There was places where there was more vegetation than others, but the average depth would be about four feet, almost all of the clear water
72 was between three and a half and four and a half feet in depth.

Q. And about what portion of the water was clear?

A. I think not more than one-fifth.

Q. What proportion of the lake bottom was covered with water?

A. A very large portion of it. I presume by the profile the banks are quite abrupt from the edge of the water and so I would say the lake covered almost as much territory as it originally covered, except at the north where the banks are lower.

Q. That is, the water covers as much water as it originally did except at the north?

A. Yes sir, except at the north where the banks are lower, and it extended over perhaps a hundred acres more than——.

Q. At the time these elevations were taken were there photographs made of this—the lake?

A. Mr. Mason made photographs at the points where the first five profiles were made.

Q. Will you examine Exhibits E to H inclusive, and tell, if you

know, whether or not those are the photographs that were taken at those points at that time?

A. D is the photograph taken at the point of profile No. 1, E at the point of profile No. 2, F at the point of profile No. 3, H at No. 5, and G at No. 4.

Q. What would you say about these photographs, D to H inclusive, being a fair representation of the lake covering that portion of the ground which they are—purport to represent?

A. They show the contour of the ground as it would appear to the eye.

73 Q. You consider them a fair and accurate representation of the contour of the ground?

A. Yes sir.

Cross-examination:

I made these levels on the 22d day of July, 1907. I do not know all these different profiles on Exhibit "1", just where they are situated with reference to the meander lines of the lake. The profiles were taken from the water's edge, each of them. Profile "1" Station 4 is at the edge of the lake and the other five, one is the water's edge.

Re-direct Examination:

Exhibits "D" to "H" inclusive were not taken at places where the most clear water was shown, so far as I know. I don't think that was taken into consideration. The photographs were taken at the points the profiles were made at the points where the parties who employed me wanted them made. In most cases the growth on the banks of the lake is blue grass or other grasses. At the point of overflow where profile No. 1 was made there were quite rank weeds and grasses.

Mr. Evans: It is admitted that the witness, Mr. Mason, would identify the photographs, Exhibits "D" to "H" inclusive, and that his testimony would be substantially that of the last witness in reference to the photographs.

Mr. Mason, called on the part of the State, examined by Mr. Casson:

The photographs Exhibits "E" to "H" show perhaps one-half the banks of Goose Lake, not to exceed that perhaps less than that part, and the sum of them show perhaps a mile of the bank.

74 The contour of the land and slope and elevation as it appears in the photograph is absolutely correct. It is taken with a lens, not by hand. They are not photographed pictures, they are camera.

W. S. Irving, called as a witness in behalf of the State, examined by Mr. Casson:

Mr. Evans: It is admitted on the part of the defendant that the testimony of this witness as to levels taken by Surveyor Thompson

would be substantially the same as that of Thompson as to the condition of the banks.

I have lived in Greene County since 1876; have known Goose Lake since July 1876. I saw it two or three times in 1877, there was quite an amount of clear water. I suppose there was more than two-thirds of it clear water at that time. I was along with men twice that was getting the depth of the lake and from what they said——.

Mr. EVANS: We object to any statement of the witness of what any one said.

I saw them measuring the depth and from the best of my recollection would say that it was 15 feet deep at the deepest point. I should judge 7 or 8 feet would be the average depth of the lake. I should judge there is possibly 4 feet of water in the lake now, that is that is the average depth. Not near so much of the surface of the lake is covered now as in the earlier days.

Cross-examination:

I am thirty-nine years old, when I first saw the lake in 1876 I was nine years old. I did not look at the lake at that time with a view of discovering how much clear water there was on it. I saw it and knew how it was. The soundings to determine the depth were taken in 1882 or 1883 and another in 1886. That's the best of my recollection. I did not do the measuring myself when the soundings were taken, they measured with a long pole; I did not measure the pole thereafter. I am simply giving my opinion as I observed the pole.

Re-direct Examination:

There were sailboats and one or two row boats, flat bottom boats on the lake. I have caught fish there, some that weighed six or seven pounds.

Re-cross Examination:

These levels were taken sometime in July. There was considerable rain in June and July, but not so much as there had been at other times, about three years ago there was six or eight times as much rain. There was sometimes during the month of June and the early part of July that the farmers could not successfully cultivate their fields. I don't think though it was half the time.

FRANK W. WILLOUGHBY, a witness for the State, examined by Mr. COSSON:

I have lived in Greene County since 1873 and in Jefferson for eighteen or nineteen years; have known Goose Lake since 1873 and have seen it quite often; we used to live just back a little way from the lake. We called the lake 12 feet deep in 1874 and '75 but I never measured it. Father's uncle was quite a duck hunter and he was hunting a good deal. I was there a good deal and over

the lake a good deal during the time. I was too small to shoot a gun
at that time. The lake is five or six feet lower than it was in
76 the earlier years, I should say. The largest fish I ever caught
at the lake was probably two pounds; there was a sailboat there, rowboats duck boats. In the spring of the year the lake was all open water, in the fall of the year about two-thirds of it when I first knew it.

LOUIS HELLER, caled as a witness in behalf of the State, examined by Mr. COSSON:

I have known Goose Lake since 1876, the lake was full of water when I first saw it, it would overflow sometime in the spring and sometime in the fall, some seasons it would overflow during the entire year, I could not tell what depth it was, have been over it a good many times with a boat and with a pole and there was places I could not touch bottom. I suppose the average depth was eight or ten feet.

Cross-examination:

The rushes kept growing in it, came up every few years, when it got dry the rushes all came up. I do not remember that it was dry in 1860, I was not here then.

Q. Did you in 1895, with other citizens, sign a petition to the Commissioner of the General Land Office asking that the land might be patented under the Swamp Land Grant?

Mr. COSSON: That is objected to as immaterial and irrelevant.

A. I signed a petition. Mr. Fuller came out there with a petition; said he owned the lake and wanted me to sign it; wanted me to buy a piece and I told him I would when he drained it. I signed the petition.

Q. In the petition was the statement made that the lake
77 was useless as a body of water and being unhealthy and marshy?

Mr. COSSON: Same objection.

A. I could not tell you. I don't think there was more than between one-half and one-third probably of the lake covered with rushes during the first years I knew it.

JOHN CARTER, witness for the State, examined by Mr. COSSON:

I lived in Bristol Township, Greene County, Iowa, have known Goose Lake since 1877, there was half or two-thirds of it clear water when I first saw it. The banks of the lake were almost full when I first saw it. I think the water has receded back from fifty to seventy-five feet from the banks; I lived right by the lake this summer; it's all grown up to rushes, there are some patches of clear water.

L. P. BLODGETT, called in behalf of the State, examined by Mr. COSSON:

I lived in Greene; have known Goose Lake twenty-seven years; two-thirds or more of the lake was clear water when I first saw it. When I first saw it the banks were steep—you would go down perhaps four feet or more right into the water. All the banks were abrupt.

Plaintiff offers in evidence Exhibits "D" to "H" inclusive, being the photographs taken of the lake and those referred to by the witnesses.

78 EXHIBIT D.

EXHIBIT E.

EXHIBIT F.

79 EXHIBIT G.

EXHIBIT H.

Plaintiff offers in evidence Exhibit "I," being a plat of the profiles showing the levels and soundings and surveys made by the Surveyor Thompson, being the plat referred to by said witness in his testimony.

NOTE.—Exhibit I cannot be properly copied and original may be produced.

Mr. EVANS: The defendant offers in evidence the decision of the Secretary of the Interior, dated April 1st, 1904, in the matter of the application of John H. Moore, Grantee, Hamilton County, for survey of certain lands in Hamilton County, the same being marked Exhibit "20."

80 EXHIBIT 20.

In re Application of JOHN H. MOORE, Grantee, of Hamilton County, Iowa, for Survey of Lands.

The Commissioner of the General Land Office.

SIR: With your letter of October 31, 1903 you transmit the application of John H. Moore, grantee of Hamilton County, Iowa, for the survey of what is alleged to be a body of swamp and over-flowed lands in T. 88 N., R. 23 W. Iowa, embraced within the area represented upon the township plat as a meandered lake covering parts of sections 14, 15, 22, 23, 24, 25 and 26.

The applicant files in support of the petition the affidavit of George A. Jackson, a son of the deputy who surveyed the township, and one of the chainmen who assisted in making the survey. Jackson testifies that the survey was made in October 1849. That at that time, reeds and swamp cane could be seen extending out of the water. That he and one or two of the surveying party waded into the water. That they rowed a small boat with difficulty across the "lake," which did not exceed two feet in depth in the deepest places. That there were a great many muskrat houses over the surface and it was only meandered because the deputy declared to the surveying party that he would not require them to wade into the water to locate the section and quarter section corners. That the only outlet to the basin was filled with decayed vegetable matter that had accumulated. If the outlet had been cleared the water would all have been carried off and the section and quarter section corners could have been
81 readily located. That the land covered by the shallow water meandered as a lake was in fact swamp land which could have been made tillable by artificial drainage, and at the time of the survey it had more of the appearance of swamp land than a lake.

There is also submitted the affidavits of other witnesses some of whom have known the condition of the land for a period commencing four or five years after the date of the survey. Their testimony is substantially to the effect that there are no springs in the bed of the basin and that the land surrounding it is low, that there are no well defined shores or banks, as are usually found around bodies of water that are in fact lakes, but the bed of the lake is simply a depression in the surface of the land into which the surrounding lands drain, and that the water which is accumulated therein from the melting snows remains but a short period and dries up in the summer, so that a person can hunt all over the bed of the basin.

From the facts testified to by these witnesses it would appear that what was called a lake was only a shallow winter and spring pond

formed by the melting of snows and held by the accumulation of decayed vegetable matter in the outlet. The witnesses testify in substance that it is nothing more than overflowed land that can always be kept dry by increasing the size of the drainage canal. That the land without drainage would not produce agricultural crops, but having been drained a few years ago, it has since that time produced excellent crops of hay.

One of the witnesses who passed the basin twice a week during the years 1865 and 1866, testified that what is called the lake drains a large area of territory and in the spring of the year when there are heavy rains, or when there had been snows in the winter
82 previous the water would accumulate upon the land for a short time to the depth of two or three feet but during the summer it would drain out, so that persons could wade over the whole of the bed.

The applicant also offered in support of his petition the decision of the Superior Court of Iowa in the case of Carr vs. Moore, (93 N.W. Rep., 52), which was an action to quiet title to a portion of the lands in controversy. The facts appearing of record in that case are stated by the Court as follows:

"There is practically no testimony of witnesses from personal knowledge as to the condition of the lake at the time of the government survey, but there is testimony showing substantially its condition from a time within ten years subsequent to the original survey down to the present time. About ten years after the survey, although previous to that time it had contained water the so-called lake became *practically dry during one season*. Subsequently it re-filled with water; but around its margins, and during some seasons through its entire extent, with the exception of perhaps one or two places where there was considerable depth of water, (at one of these deeper points there is still a so-called pond), it was *grown up with rushes and grass*. It was swampy in character, the bottom composed of prairie mud and a peaty substance. It had no definite shore line, but the ground around it sloped gradually down to and under the water. When full of water, the depth over its entire extent, with the exception of one or two deeper places above referred to, did not exceed five or six feet, and it was shallower in the central portion, its greatest depth being along its sides. It had no springs or other subterranean sources of water supply, nor did it have any definite inlet, the water coming into it in the wet season from the general surface drainage of the surrounding country. It had a shallow outlet called a creek,
83 through which water flowed from it when it was filled. This remained its substantial condition so far as observed by witnesses for about twenty years, after it had become dry within ten years of the survey, and after this period of twenty years the water became shallower and it was less frequently filled, until, about fourteen years before the bringing of these suits, when it became practically dry. At the present time, owing to the cultivation of the surrounding country, the surface water does not drain into it. Some of the witnesses liken it to ordinary prairie sloughs or ponds, save as to its greater extent. Within the memory of witnesses, the water

has never for any length of time at least come out to the meander line.

From these facts the court found that there was at the time of the original survey no lake in the proper sense of the term, such as to give occasion for the application of the doctrines of accretion and relliction, the action having been brought by the shore proprietors in virtue of their riparian rights.

Subsequent developments show that what may have had the appearance of a lake at the time of the survey was in fact overflowed land, which produced swamp vegetation over most of the surface; that the land could readily have been drained and has been since drained so that the entire surface is agricultural land. In fact, even at that date, at certain seasons of the year part of the land was practically uncovered and what portion was not uncovered was covered with water of such shallow depth as not to obstruct passage across it. The witnesses testify to a time so proximate to the date of the survey as to indicate with reasonable certainty that what may have then had the appearance of a lake was merely a temporary accumulation of water and that the land was in fact over-flowed land susceptible of drainage, thus bringing it clearly within the character
84 of land contemplated by the act of September 28, 1850.

"In view of the facts as shown by the testimony offered in support of the application showing that at the date of the swamp land act all of the land within the meander line was covered by water and that the entire tract as segregated by the township survey was swamp and over-flowed land, there seems to be no necessity for a survey as the land is already defined by specified boundaries and may be listed, certified and patented as the whole of the unsurveyed portions of the sections heretofore mentioned.

You will cause a list to be prepared accordingly, and submit the same for appropriate action.

The papers are herewith returned.

Very respectfully,

(Signed) E. A. HITCHCOCK, *Secretary.*

Mr. Cosson: The state objects to the introduction of Exhibit 20 for the reason that the same is incompetent, irrelevant and immaterial.

Mr. Evans: The defendant now offers in evidence Exhibits No. 6 to 17 inclusive, the same being the photographs identified by the witness Bean.

Mr. Cosson: Objected to as incompetent, irrelevant and immaterial.

Decree.

On the 24th day of September, 1907, the cause came on for hearing before the District Court, upon testimony taken and arguments presented, and the Court rendered its decree in said cause, finding for the plaintiff and sustaining the petition, issuing its perma-
85 nent injunction against the defendant, as prayed for in said petition, from which ruling, decree and decision defendants then and there accepted.

Appeal.

On the 17 day of January, 1908, the defendants perfected their appeal in said case by serving notice of appeal upon the Clerk of the District Court, and the Hon. W. H. Byers, Attorney General of the State of Iowa, and Attorney for the Appellee.

Certificate of Attorney.

The foregoing abstract contains a full, true and complete abstract of the record in said cause including the pleadings, evidence taken therein, exhibits, objections, rulings of the court and final judgment.

Notice is hereby given that, together with this abstract there is filed with the Clerk of the Supreme Court, the evidence introduced on the trial of this cause, taken by the official shorthand reporter, transcribed by him and duly certified by the reporter and the trial Judge as provided by law.

Notice is hereby given that appellants will submit oral argument when this cause is submitted.

E. B. EVANS,
C. L. NOURSE,
Attorneys for Appellants.

We hereby certify that the cost of printing the foregoing abstract was the sum of $—.

E. B. EVANS,
C. L. NOURSE,
Attorneys for Appellants.

86 In the Supreme Court of Iowa, May Term, 1908.

No. 26064. In Equity.

Filed Feb. 27, 1908.

STATE OF IOWA upon the Relation of H. W. BYERS, Attorney General, Plaintiff and Appellee,

vs.

J. N. JONES, FRANK MONTGOMERY, and the MARSHALL DENTAL MANUFACTURING COMPANY, Defendants and Appellants.

Appeal from Greene District Court.

Hon. Z. A. Church, Judge.
H. W. Byers, Attorney General, and
George Cosson, Assistant Attorney General, for Appellee.
E. B. Evans and C. L. Nourse, Attorneys for Appellants.

Appellee's Amended Abstract.

Due, timely and legal service of the within amended abstract is hereby acknowledged with copy thereof this — day of February, 1908.

—— ——,
—— ——,
Attorneys for Appellants.

87 The appellee denies that appellants' abstract of record herein contains a full, true and complete abstract of the record in said cause, including the pleadings, the evidence, the exhibits, the objections, the rulings and final judgment of the court. The appellee therefore files this additional abstract, and especially corrects and amends appellants' abstract of the record as follows:

DEFENDANT'S EVIDENCE.

H. W. Bean.

There should be add'ed to the testimony of H. W. Bean, on page 38 of appellants' abstract, the following questions and answers:

Q. Do you think that a stranger could take one of these photographs and tell whether the bank of the lake is two feet or forty feet?

A. No. I do not think he could tell because he could not scale, but you could see that there was a rise.

Q. If you obscure the trees and fence, could you tell what part of the lake a photograph represented?

A. No, sir; you have to have something to look at.

Q. The photographs aside from the trees and such things as that where you know where they are located, do not represent the lake to you in such a way that you could locate any part of it; that is the particular part of the lake that the photographs cover?

A. I would not consider it at all essential.

Q. Question repeated.

A. You have to have some object to guide you in its location.

88 Q. You could not form from picking up one of these photographs and locating it or any one who had ever seen the lake could not pick up these photographs and form an idea how much of the lake bed was covered with water?

A. No; taking those as they are there you could not tell.

Q. Were any of the photographs taken from the center of the lake?

A. Not that I know of. Not while I was there. I think Mr. Evans took the first seven while we were together.

Jefferson Tolliver.

There should be added to the testimony of this witness on cross-examination, page 42 of appellants' abstract, the following:

Q. How was the water's edge the first time you saw it as compared with where you saw it yesterday?

A. Oh, it has receded back quite a ways from where I first saw it.

Q. From several rods to several feet in places?

A. Yes.

A. J. Morland.

There should be added to the testimony of this witness, on page 45 of appellants' abstract on recross examination, the following:

Q. About how far would the water be from where the meander line is?

A. Oh, I don't know. I have seen it when it was up to where the meander line is.

89 Q. Clear out to the top of the bank?

A. Pretty near to the level of the bank.

Q. At times it was down lower than the edge of the bank?

A. Yes, down to the lower edge.

Q. About how far is it from the lower edge of the bank to the top of the bank?

A. I don't know. I never measured to see.

Q. What is your best judgment?

A. Well, it would be six or eight or ten feet.

Q. So that the water line at times would be six or eight or ten feet from the top of the bank from where the meander line is now?

A. Yes.

Q. And at times it would be right up to the top of the bank?

A. Yes.

STATE'S EVIDENCE.

Harry W. Thompson.

There should be added to the redirect examination of this witness, on page 73 of appellants' abstract, the following:

Q. Referring now to photographs referred to as Exhibits "D" to "H" inclusive. I will ask you whether or not the photographs were taken at the place where the water showed most in the lake?

A. I don't know that they were. The clear water that had any depth to it was farther out than can be seen in any of the

90 photographs. The deep water of the lake is in the center.

W. S. Irving.

There should be added to the testimony of this witness on redirect examination, on page 75 of appellants' abstract, the following:

Q. Do you remember the day the levels were taken by the surveyor, Mr. Thompson?

A. Yes, sir.

Q. Were those taken immediately after a rain?

A. No, sir. In fact the lake is higher now than it was then.

Q. There had not been any rain for two or three days?

A. Not for some time. I could not say for how long.

Louis Heller.

There should be added to the testimony of this witness, under the examination in chief, on page 76 of appellants' abstract, the following:

Q. How does the amount of water in the lake now compare with that in early years?

A. There is not nearly as much water in it as there was. You see it goes over I suppose about five hundred acres.

Q. How much of the bottom of the lake is covered with water now?

A. I suppose about five hundred acres, I should judge. The lake has seven hundred and fifty acres in it and I suppose there is about five hundred acres under water now.

91 Q. What amount of the lake was clear water in those early years?

A. I should judge there was between one-half and two-thirds.

On pages 84 and 85 of appellants' abstract what purports to be a decree of the court is simply the conclusion of appellants' counsel as to the holdings of said decree. The following should, therefore, be substituted, which is a verbatim copy as signed by court:

(Caption Omitted.)

Decree.

Now this 24th day of September, 1907, the same being the — day of the September term of the district court aforesaid, this cause coming on for hearing and the plaintiff appearing by H. W. Byers, attorney general, and George Cosson, assistant attorney general, and the defendants appearing in person, and by their attorney, E. B. Evans, and the court having inspected the original notice, the record and the pleadings in said cause, finds that personal service was duly and legally made upon each of the above named defendants, and that all the parties to this action are now properly in this court and subject to the jurisdiction thereof.

The court, after hearing the testimony in said case, and the argument of counsel, and being fully advised in the premises finds: That the equities are with the plaintiff; that there is a body of water about one and one-half miles in length by one to three-fourths of a mile in width, known as Goose Lake; that said lake was meandered by the general land department in the original gov-

92 ernment survey of Greene county, Iowa, under the order and direction of the surveyor general, and segregated from the public lands; that said Goose lake comprises all that portion of section 36, in township 85, range 31, west of the 5th p. m., and sections 1 and 12, in township 84, range 31 aforesaid, and sections 6 and 7, in township 84, range 30, west of the 5th p. m. in Greene county, Iowa, which was meandered by the government survey and excluded from public lands aforesaid.

That on the — day of ——, formal written application was made by the Marshall Dental Manufacturing Company, the principal defendant herein, to the secretary of the interior to have said Goose lake surveyed by the general land department, alleging as a ground therefor that said lake was not a body of water proper to be meandered at the time it was so meandered by the general land department but was in fact swamp land; that after an ex parte hearing on said application upon affidavits submitted by said applicant, and after due consideration thereof, the said secretary of the interior dismissed said application, and confirmed the action of the surveyor general in meandering said lake and excluding same from public lands, and held that in so far as the interior and general land department was concerned the matter was closed, and the decision final. That no direct attack was ever made on the said decision and finding of the said secretary of the interior, or the action of the general land department.

The court further finds, that there was no fraud or mistake in the action of the general land department in the meandering and segregating of said Goose lake. That said action of the general land department in meandering said Goose lake, and the
93 action of the secretary of the interior, after the ex parte hearing as aforesaid, confirming and approving the action of the general land department and the surveyor general in the meandering of said lake is binding and conclusive upon this court in a collateral proceeding of this nature; but whether this be true or not, the court finds, as a matter of fact, that Goose lake was a body of water proper to be meandered at the time it was so meandered in the original government survey of Greene county under the directions of the surveyor general.

The court finds that there was no testimony offered to show, nor does it appear from the record herein, that the said land within the meandered lines of said Goose lake was ever listed, designated or included in the swamp lands of Greene county, Iowa, and that therefore, the said defendants, or any of them, could not acquire any right, title or interest in and to the lands lying within the meandered lines of Goose lake under the Swamp Land Act through mesne conveyances, or otherwise, and that said defendants have no right, title or interest in and to said Goose lake, nor any of the land lying within the meandered lines of said Goose lake.

The court further finds that the title to said Goose lake is in the state of Iowa for the use and benefit of the people.

It is therefore ordered, adjudged and decreed that the temporary injunction heretofore issued out of this court against the defendants herein be made perpetual, and that the said defendants, J. N. Jones, Frank Montgomery and the Marshall Dental Manufacturing Company, their servants, agents and representatives, and all persons engaged in the attempt to excavate and construct a ditch, or to in any manner drain the water from the lake in controversy herein, known as Goose lake, be perpetually enjoined from in any
94 manner excavating or constructing a ditch for the purpose of draining the waters from said lake, or from in any man-

ner draining Goose lake; and that each and all of said defendants be perpetually enjoined from in any manner, either directly or indirectly, by themselves, their agents or representatives, trespassing upon the land of the state of Iowa under the waters of said lake, or within the meandered lines of the lake aforesaid.

To all of which the defendants at the time duly except.

Z. A. CHURCH,
Judge of the Sixteenth Judicial District of Iowa.

Certificate.

We hereby certify that the foregoing abstract is a part of the record in the above entitled cause and that said amended abstract, together with appellants' abstract, contains a full, true and complete abstract of the record in said cause, including the pleadings, the evidence, the objections, the rulings of the court and final decree and judgment in said cause.

H. W. BYERS,
Attorney General;
GEORGE COSSON,
Assistant Attorney General;
For the State.

I hereby certify the cost of printing the within amended abstract is $—.

H. W. BYERS,
Attorney General.

95 In the Supreme Court of Iowa.

Filed Jun- 18, 1910. H. L. Bousquet, Clerk Supreme Court.

J. N. JONES, FRANK MONTGOMERY, and MARSHALL DENTAL MFG. CO., Plaintiffs in Error,
vs.
STATE OF IOWA, Defendants in Error.

Petition for Writ of Error.

To the Supreme Judges of the State of Iowa:

Your petitioners, the Marshall Dental Mfg. Company represent that on the 2nd day of July, A. D. 1909, there was rendered a judgment, decree and decision in this Court wherein the state of Iowa was appel-ee and the Marshall Dental Mfg. Company was appellant, by which judgment, decree and decision, the judgment of the District court of Greene County, Iowa was affirmed and judgment was rendered against the appellant's claim for the title of the land involved in said suit, to-wit:—About six hundred acres of land situated in Section 36, Township 85; Range 31; and Sections 1 and

7. The Court erred in holding that the selection and patenting of the land in controversy under the Swamp Land Grant of Sept. 28, 1850 was a condition precedent to the plaintiffs having and asserting title to the land in controversy.

98 8. The Court erred in its holding and deciding in its opinion in said judgment that the title to the beds of all non-navigable lakes which were properly meandered vest in the state by virtue of its sovereignty.

9. The Court erred in holding that the land in controversy was the bed of a lake which came within the law and rulings of the Interior Department with reference to the meandering of bodies of water.

10. The Court erred in holding that to constitute a lake proper to be meandered under the law and rulings of the Interior Department it was not necessary that the water in said lake should cover its bed at all seasons of the year.

11. The Court erred in holding in its decision and judgment that to constitute such a lake or body of water, it was sufficient if it had well defined banks which were filled during a portion of the year.

12. The Court erred in holding that the state has jurisdiction and authority to control the bed of an un-navigable lake situated within its borders.

13. The Court erred in holding in its judgment *and judgment* that the state had such an interest in the land in controversy as to support an action to restrain the defendants from possessing, holding and using the land in controversy.

14. The Court erred in holding that the land in controversy or the water which may from time to time be on said land, has now or ever did have any value for public purposes.

15. The Court erred in directing that final decree should be entered in the district court of Greene County and erred in directing its said judgment to be filed in said county, by the district court of said county, and the final decree entered by the district court of Greene County in said county under and by direction of the supreme court of Iowa, herein complained of was erroneously entered.

And, thereupon upon the foregoing assignment of errors, the said Marshall Dental Mfg. Company, respectfully asks and prays that upon the writ of error granted upon its petition, and for the review of the errors herein assigned, that the said judgment, decree and decision of the Supreme Court of Iowa, and of the district court of Greene County, in the state of Iowa, may be reversed and the action, decision and judgment of the said Supreme Court of Iowa may be reversed and the action, decision and judgment of the Supreme Court of Iowa may be set aside, and the final decree made and entered by the district court of Greene County, Iowa, and filed in said county, which decree was so made and entered in accordance with the decision and direction of the Supreme Court of the state of Iowa made and set aside, and the said Marshall Dental Mfg. Co., will so ever pray.

E. B. EVANS,
Attorney for Marshall Dental Mfg. Co.,
Plaintiffs in Error.

Service accepted this 17 day of June 1910.

H. W. BYERS,
Attorney General;
GEORGE COSSON,
Attorneys for Defendant in Error.

[Endorsed:] J. N. Jones, et al. vs. State of Iowa. Assignment of errors.

99 In the Supreme Court of the United States.

Filed Jun- 18, 1910. H. L. Bousquet, Clerk Supreme Court.

J. N. JONES, FRANK MONTGOMERY, and MARSHALL DENTAL MFG. CO., Plaintiffs in Error,
vs.
STATE OF IOWA, Defendants in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Iowa, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court, before you, between the state of Iowa, plaintiff and J. N. Jones, Frank Montgomery and the Marshall Dental Mfg. Company, defendants, wherein was drawn in question the construction of certain statutes of the United States affecting the right and ownership of the said Marshall Dental Mfg. Company to certain real estate situated in Section 36; Township 85; Range 31, and in Sections 1 and 12 in Township 84; Range 31, and in Sections 6 and 7 in Township 84; Range 30, West of 5th P. M. Iowa, and said decisions being contrary to the rights of plaintiff under said statutes, and a manifest error has happened to the great damage of the said Marshall Dental Mfg. Company as by its complaint appears, we, being willing that error, if error hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ; so that you have the same at Washington on the 11 day of July next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of June A. D. 1910. Issued at office in the city of Des Moines with the seal of the

Circuit Court for the Southern District of Iowa and dated as aforesaid.

[Seal U. S. Circuit Court, Southern District, Iowa.]

WM. C. McARTHUR,
Clerk of U. S. C. C., Southern District of Iowa.

Allowed.

H. E. DEEMER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] J. N. Jones et al. vs. State of Iowa. Writ of Error.

100 *Appeal Bond to Supreme Court of the United States.*

Filed Jun- 18, 1910. H. L. Bousquet, Clerk Supreme Court.

In the Supreme Court of Iowa.

THE STATE OF IOWA ex Rel. C. W. MULLEN, Att'y General,
vs.
J. N. JONES, FRANK MONTGOMERY, and the MARSHALL DENTAL MFG. CO.

Know all men by these presents, that we the Marshall Dental Mfg. Company as principal, and A. H. Marshall, M. R. Marshall as sureties are held and firmly bound unto the state of Iowa in the penal sum of five hundred ($500) dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our heirs, executors and assigns, firmly by these presents.

Dated this 14 day of June, A. D. 1910.

The condition of this bond is such, that whereas the said Marshall Dental Mfg. Co., has sued out a writ of error from the supreme court of the state of Iowa to the Supreme Court of the United States from the judgment or order of the Supreme Court of the state of Iowa, made at the May term of said court July 2, A. D. 1909 in a certain cause in said court wherein the state of Iowa is plaintiff and the Marshall Dental Mfg. Company, a corporation, is defendant:

Now, if the said Marshall Dental Mfg. Company shall pay all costs and damages that shall be adjudged against them and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render in Order to be rendered, by the Supreme Court of the United States, and all damage during the pendency of the appeal and prosecute their said writ of error with effect, and if it shall fail to make its plea good, it shall answer all damages and costs, then this obligation to be void, otherwise to be and remain in full force.

MARSHALL DENTAL M'F'G CO.,
By A. H. MARSHALL, *Pres.:*
By M. R. MARSHALL, *S'y.:*
Principal.
A. H. MARSHALL, *Surety.*
M. R. MARSHALL, *Surety.*

The undersigned being first duly sworn each for himself deposeand says that he is surety on the foregoing bond, that he is a resident and freeholder of the state of Iowa, and is worth the sum of $1,000 beyond the sum of his debts, and has property in this state liable to execution equal to the sum of $1,000.

A. H. MARSHALL.
M. R. MARSHALL.

Subscribed and sworn to before me this 14 day of June, A. D. 1910.

[Notarial Seal, E. B. Evans, Iowa.]

E. B. EVANS,
Notary Public in and for Polk County.

101 The within and foregoing bond is filed, accepted and approved by me this 14th day of June, A. D. 1910.

H. E. DEEMER,
Chief Justice Supreme Court of Iowa.

Filed this — day of June A. D. 1910.

____ ____,
Clerk of Supreme Court of Iowa.

Approved this — day of June, 1910.

____ ____,
Clerk of Supreme Court of Iowa.

I, J. P. Maher, Clerk of the district court within and for Polk County, Iowa, hereby certify that I know the sureties named and within the foregoing bond, and that I am acquainted with their financial ability, and that if the within bond were presented to me for approval I would have no hesitancy in approving the same.

In witness whereof, I hereunto set my hand and affix the seal of the said court, at Des Moines, Iowa, on this 14 day of June, A. D. 1910.

[Seal of the District Court, Polk Co., Iowa.]

J. P. MAHER,
Clerk of District Court of Polk County, Iowa.

102 In the Supreme Court of Iowa.

J. N. JONES, FRANK MONTGOMERY, and the MARSHALL DENTAL MFG. CO. et al., Plaintiffs in Error,

vs.

STATE OF IOWA, Defendants in Error.

E. B. Evans, attorney for plaintiffs in error.

W. H. Byers and George Cosson, attorneys for defendants in error.

To B. F. Carroll, Governor of Iowa, and W. H. Byers, Attorney General, and to George Cosson, Attorneys for the State of Iowa:

Whereas the Marshall Dental Mfg. Company has lately sued out a writ of error to the Supreme Court of the U. S. from a judgment, decree and decision rendered on the 2nd day of July 1909 by the Supreme Court of Iowa in favor of the state of Iowa, and from the final judgment and decree rendered by and in the District Court of Greene County in the state of Iowa, which judgment was entered by said District court by direction of, and in conformity with, the said judgment, decree and decision of the Supreme Court of Iowa, and the said Marshall Dental Mfg. Company has filed the security required by law and perfected its said writ of error, you are therefore hereby cited to appear before the Supreme Court of the U. S., at the city of Washington, thirty days from date of this citation, to do and receive what may appertain to justice to be done in the premisses.

Given under my hand in the city of Des Moines, Iowa, on the 14th day of June, 1910.

H. E. DEEMER,

Chief Justice of the Supreme Court of Iowa.

DES MOINES, IOWA, *June* 14, 1910.

Due and legal service accepted of the foregoing order and citation on the day and date above written.

B. F. CARROLL,

Governor of the State of Iowa.

H. W. BYERS & GEORGE COSSON,

Attorney General and Attorneys for Defendants in Error.

[Endorsed:] J. N. Jones et al. vs. State of Iowa. Citation.

103 Filed July 2nd, 1909.

In the Supreme Court of the State of Iowa.

26064.

STATE OF IOWA
vs.
J. N. JONES, FRANK MONTGOMERY, and the MARSHALL DENTAL MANUFACTURING COMPANY, Appellants.

Appeal from District Court of Greene County.

S. A. Church, Judge.

Action to enjoin the defendants from draining water from Goose lake resulted in a decree as prayed. The defendants appeal.

H. W. Byers, Att'y Gen. and George Cosson, Ass't Att'y Gen. for the State.
E. B. Evans and C. L. Nourse for appellants.

LADD, *J.*:

Goose Lake is that portion of sections one and twelve in township Eighty-four and of section 36 in township eighty-five north of range No. thirty-one. West of the 5th P. M. and of sections six and seven in township eight-four of range thirty, West of the 5th P. M. meandered by the government survey of 1853. It is several hundred acres in extent and, as the evidence shows, has a well defined bank or rim. The water is and always has been shallow,
104 varying in depth with the falling of rain and the melting of *snows*. It is surrounded by highlands which drain into it and has no outlet save a swale through which the water flows out when the bed fills. Much of the time a large portion of the bed is overgrown with rushes, water lillies and other vegetation so that not more than one-fifth of the water in it is clear. In 1907 when the surveyor employed by defendants surveyed it he found much of the bed so dry that he excavated at several places finding the vegetable mould on the bottom from twenty to thirty inches deep underlaid with one to six inches of sand with clay below. The surveyor employed by the plaintiff thought much of the bed covered with water when he examined it during the same year. The evidence indicates that during the dry portions of the season the water in the lake is from eighteen inches to five or six feet deep and grass covers much of the bed and that when the bed fills so as to overflow it is from three or four to eleven to sixteen feet deep. Boats ans skiffs have been kept on the lake for hunting and fishing purposes since the early days of settlement. It can not be said with any degree of accuracy from the photographs from how much of the bed the water recedes but the condition of vegetation on the bottom indicates much of it becomes dry during the dry season.

The Marshall Dental Manufacturing Company obtained a conveyance of the lake bed in controversy through several main conveyances from the American Immigrant Company to whom Greene County had conveyed all the swamp lands within its borders but no patent has ever issued from the United States to the state therefor and for this reason the legal title thereto if a part of the swamp lands, remains in the general government.

Young v. Charnquist, 114 Iowa 116;
Ogden v. Buckley, 116 Iowa 352.

An application was made by this company to the general land office in 1903 for the survey of the lake bed and the secretary of the interior in a careful opinion, reviewing the evidence, including the field notes of the government survey, found that insufficient
105 proof has been submitted to impeach the correctness of the survey by which Goose Lake was meandered "thereby determining so far as lies in the power of the department that the lands in controversy are not public lands." This was put upon the ground that "the department has power to correct surveys upon a proper showing but, as has been frequently said, the proper rule is to refuse to disturb the public surveys, except on the clearest proof of accident, fraud or mistake where a resurvey may effect the rights or claims of any one resting upon the original survey." The secretary pointed out that in as much as the department declined to do anything, a remedy in the courts might be open to the applicant under the doctrine of Railroad Co. v. Smith, 9 Wallace 95 as construed in French v. Ryan, 93 U. S. 169 and observed that "the title to the beds of all lakes that were properly meandered vest in the state by virtue of its sovereignty and no reason can be perceived why the state can not assume control of this land and reclaim it by drainage or make any other disposition it may see proper in view of this decision holding that the lake bed is not public land left unsurveyed." In view of this decision by the department of the government, empowered to pass upon the question, as has been held in numerous cases, we are not prepared to say that this lake bed passed under the terms of what is known as the "Swamp Act" of Congress. One of the rules promulgated by the department for the guidance of surveyors is the following: "You are also to meander, in the manner aforesaid, all lakes and deep ponds of the area of twenty-five acres *the* upwards; also navigable bayous; shallow ponds readily drained or likely to dry are not to be *a* meander." Surely this lake comes within the description of bodies of water to be meandered and in view of the decision of the Secretary of Interior it should be regarded a non-navigable lake. To constitute such a lake no particular depth of water is essential, nor is it necessary that the water cover the entire
106 bed at all seasons of the year. It is at least enough if the body of water has well defined banks which are filled during portions of the year. It is apparent that the company has no legal title although it was proceeding at the time the injunction was sued out to drain the waters from this lake by the excavation of ditches and the laying of tile. The mere fact however that it had no title

will not alone justify restraining defendants from making this improvement. Unless the state has title to or control over the bed of the lake or the water covering it, it may not interfere. The law is settled in this state that the owner of land bordering on a non-navigable body of water meandered by government surveyors has title to the water's edge and not to the center of the lake as is held in some states. Wright v. Council Bluffs, 130 Iowa 274. State vs. Thompson, 134 Iowa 25. And the Supreme Court of the United States has laid down the rule that this question is peculiarly for the decision of the respective states.

Hardin v. Jordan, 140 U. S. 371; 35 L. Ed. 428.

In many states the riparian owner is held to take title in the bed of the lake to its center and such appears to have been the rule at common law. See

Hardin v. Jordan, supra.
Bristow v. Cormican, L. R. 3 App. Cas. 641.
Cobb v. Davenport, 32 N. J. L. 369.
Shell v. Matteson, 81 Minn. 38.
Clute v. Fisher, 65 Mich. 48.
Hodges v. Williams, 95 N. C. 331; 59 Am. Rep. 242.
Webster v. Harris, 59 L. R. A. 324.
Poyntor v. Chipman, 8 Utah 442.

The rule in this state, as will appear from the decisions, is well supported by authority and the inquiry arises what becomes of the title to the bed of the lake when the riparian owner takes to the water's edge only. Is it retained by the United States or does it pass to the state in which the body of water is located? The question has been raised in this court several times but never determined.

In Read v. Wallace, 109 Iowa, 5, a readiness to assume
107 title to be in the state was expressed and this was assumed in State v. Thompson, 134 Iowa, 25. In Carr v. Moore, 119 Iowa, 152, in stating that riparian owners take to high water mark only, the court added "the title being in the state." But this was mere dictum and the suggestion in State v. Thompson that "the State became the owner of all lands forming the bed of the inland lakes within its borders which had been meandered by government survey and excluded from public lands as was the lake in question" was of a proposition not controverted and not as the finding of the court. If title is within the state when and how was it acquired? Under the treaty of 1803 with the French Republic through which the Louisiana territory, out of which this state was carved was acquired, all vacant lands, not privately owned were expressly ceded to the United States. These had been obtained by France from Spain under treaty of three years previous. The Act of Congress, approved Mar. 3, 1843 for the admission of Iowa as a State provided that "it shall never interfere with the primary disposal of the public lands lying within its borders." And this condition was accepted by the state and in an act of the General Assembly dated Jan. 15, 1849 to the effect that it would not "interfere with the primary disposal of the soil within the same by the United States nor with any regula-

tions of Congress may find necessary for securing the title in such soil to bona fide purchasers thereof." The title to said lands in the United States became perfect and complete as to any others of the public domain.

1 Kent Com. 257.

As remarked in Irvine v. Marshall, 20 Howa. 558; 15 L. Ed. 994: "It cannot be denied that all the lands in the territories not appropriated by competent authority before they were acquired are in the first instance the exclusive property of the United States, to be disposed of to such persons at such times and in such modes and by such titles as the government may deem most advantageous
108 to the public or in other respects most politic." And the word "lands" includes the beds of non-navigable lakes and streams. "Lands are not the less land for being covered with water."

Queen v. Leeds & L. Canal., 7 Ad. & El. 671, 685.
Illinois Cen. Ry. Co., v. Chicago, 176 U. S. 646.
Hardin v. Jordan, 140 U. S. 371; 35 L. Ed. 428.

Prior to the admission of Iowa as a State then title to this lake bed was in the United States and it was not thereby divested. Navigable waters in the territories are held as highways of travel and commerce by the government but with the soil beneath them pass to the new states upon their admission to the Union in virtue of their sovereignty, subject to the regulation of commerce by Congress.

Birney v. Keokuk, 94 U. S. 324; 24 L. Ed. 224.

In Illinois C. R. Co. v. Illinois, 146 U. S. 387, 425; 36 L. Ed. 1018, 1033, the court speaking through Mr. Justice Field, said: "It is the settled law of this country that the ownership of, and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always, to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565;
Weber v. State Harbor Coms., 18 Wall. 57, 21 L. Ed. 798.

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open
109 seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its

ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. Manifestly non-navigable waters are not within this doctrine and upon what theory it may be said that title to the beds of non-navigable lakes pass from the government to the state upon its admission to Union courts so holding have not taken the trouble to explain.

The whole subject is exhaustively examined by Mr. Justice White in the dissenting opinion filed in Kean v. The Calumet Canal & Imp. Co., 190 U. S. 452; 47 L. Ed. 1134. See also that in Hardin v. Shedd, 190 U. S. 508; 47 L. Ed. 1156. Nothing in the majority opinions in these decisions conflict with the view that title remains in the Government but these proceed apparently on the theory that the matter is purely one to be determined by local rules of conveyancing. In the last case, the court speaking through Mr. Justice Holmes said: "When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless, it has become established almost without argument that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. In the case of land bounded on a non-navigable lake, the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned."

110 "When land under navigable water passes to the riparian proprietor along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the State on its admission or otherwise, apart from the swamp land act, but is simply convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point." There seems no ground for saying that the state acquired title to the non-navigable lakes upon admission of the State to the Union. But as seen, in the matters of conveyancing the government with respect to lands bounded on them assume the position of a private owner. Recognizing the public utility of such waters for the purposes of fishing, boating, hunting and the like, uplands have not been surveyed, platted or sold by the government beyond the high water mark. The waters and the soil beneath have been withheld from private appropriation by the government for the benefit of all the people. And, since the earliest settlements the people have continued unmolested in the enjoyment of the benefaction. The policy of the state in stocking these small bodies of water with game fish and their protection by law has ob-

tained for many years. These lakes afford means of recreation. They supply food of inestimable value. The conclusion is unavoidable that the government in reserving the numerous small lakes of the state from sale intended them for the public use. No attention has been bestowed thereon since by the government and in all respects, save in the regulation of commerce, non-navigable lakes, like those which are navigable, have been treated as under the control and sovereignty of the State. Effect to patents of the shore lands as to the beds of lakes of either character, according to the con-
111 struction of state courts, has been given by the federal courts. The only tenable ground for these decisions is that the state either as owner of the beds or entitled to control the beds and the waters in them should determine whether these or parts of them shall pass under conveyance of the shore lands. That the reservation of non-navigable meandered lakes by the United States has been for the state in trust for all the people seems to have been the opinion of the courts of Wisconsin and Illinois. The supreme court of Wisconsin so declared in Nee-Pee-Nauk Club v. Wilson, 71 N. W., 661 saying that the soil under the lake "is owned by the state. The right of fishing and fowling upon such waters is in the owner of the soil which is under the water."

See Mendota Club vs. Anderson, 78 N. W., 185.

In Hammond vs. Shepard, 57 N. E. (Ill.), 867, the court remarked: "The law of this state, as repeatedly announced is that the shore owner on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state." In Shulte vs. Warren, 218 Ill., 108; 75 N. E. 683, it is said: "The ownership of the bed of the lake is in the state in trust for all the people for the purpose of fishing, boating and the like." And in Fuller vs. Shedd, 44 N. E. (Ill.) 286, the court speaking through Phillips, J. said: "The policy of the state, of recent years, has been to stock its water, both streams and lakes, with fish, as a means of giving cheap and valuable food to our citizens, and, with this purpose, regular appropriations and expenditures are made. If we depart from the reasonable rule we have established, the smaller non-navigable lakes would become the private waters of riparian owners, pertinent to their lands with exclusive rights thereon as to boating, fishing and the like, from which the body of the people would be excluded—a principal inconsistant with and not suited to the condition of our people nor called for as a rule of law. * * * We are asked to overrule the latter case
112 (Trustee v. Schroll, 120 Ill. 509; 12 N. E. 243) and hold that the grant to the riparian owner conveys the bed of a non-navigable lake and make its waters mere private water. We decline to do so. By such holding, so long as such meandered lakes exist over their waters and bed, when covered with water, the state exercises control, and holds the same in trust for all the people who alike have benefit thereof, in fishing, boating and the like. By the adoption of this principle, which applies alike to all meandered lakes, streams and rivers, there is no conflict with that applying to the sea; and littoral proprietors and riparian owners alike have all

the benefits and rights of such ownership and take accretions to their lands." This case again appears as Hardin v. Shedd, 52 N. E. 380 from which the appeal was taken to the supreme court of the United States. Like decisions are to be found in Massachusetts and Maine but as these are based on an ordinance of the former, enacted in 1647, which made every lake of more than ten acres in extent public, they are not pertinent.

West Roxbury v. Stoddard, 7 Allen, 158.
Bradley v. Rico, 13 Maine, 198; 29 Am. D. 501.

We are not now concerned with the enquiry as to whether the state may dispose of these lake beds in a manner inimicable to the purposes of their reservation by the general government. It is enough to dispose of the case at bar to decide as we do, that the state has such an interest in Goose Lake as will support an action to restrain defendants, who are without title, from draining the waters therefrom or otherwise exercising proprietory control over the same. The decree of the trial court is affirmed.

113 *Judgment Entry.*

Supreme Court of Iowa.

STATE OF IOWA, *ss:*

Be it remembered, That on the 2nd day of July 1909, the following proceedings, among others, were had in the Supreme Court of Iowa, to-wit:—

No. 26064.

STATE OF IOWA
vs.
J. N. JONES, FRANK MONTGOMERY, and MARSHALL DENTAL MFG. CO., Appellants.

Appeal from Greene District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby affirmed and that a writ of procedendo issue accordingly.

It is further considered by the Court that the appellants pay the costs of this appeal, taxed at $39.75 and that execution issue therefore.

I hereby certify that the foregoing is a full true and complete copy of the judgment entry of said court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In testimony whereof, I, H. L. Bousquet, Clerk of the Supreme Court, have hereunto subscribed my name and affixed the seal of said Court, at Des Moines, this 9th day of Nov. A. D. 1909.

H. L. BOUSQUET, *Clerk.*

[Endorsed:] State of Iowa vs. J. N. Jones et al. Judgment entry.

2

Office Supreme Court, U. S.
FILED.
NOV 30 1912
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 104.

MARSHALL DENTAL MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 104.

MARSHALL DENTAL MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

Brief and Argument for Appellant.

STATEMENT OF THE CASE.

The land, the title of which is involved in this action, is situated in Greene County, in the State of Iowa. At the time of the government survey of land situated in this county, it was meandered as a body of water and comprised about six hundred acres. It was known in the community and is commonly designated in the record of the case as Goose Lake.

The State of Iowa, the defendant in error here, the plaintiff below, through the Attorney General of the State, brought a suit in equity in the District Court of Greene County, Iowa, alleging that the State of Iowa, by virtue of its sovereignty, was the owner in fee of the bed of Goose Lake, and that the defendants below, the plaintiff in error here, the Marshall Dental Manufacturing Company, were about to cut and open a drain from said lake into a stream commonly known as Willow Creek, and were about to drain the waters from the said lake to the irreparable injury of the title of the State, and of the State's rights in the bed of said lake, praying for a temporary and permanent injunction against the Marshall Dental Manufacturing Company, restraining them from draining said lake or digging such a drain.

The Plaintiff in error, the Marshall Dental Manufacturing Company, denied the ownership of the State of Iowa, in her sovereign or any other capacity, to the land involved in the case, denied that the so-called Goose Lake was a proper lake to be meandered, denied that the said lake was a navigable lake or a permanent body of water, alleging that the land described in plaintiff's petition as Goose Lake was swamp and overflowed land, wet and unfit for cultivation, and that the same was granted to the State of Iowa by the Swamp Land Grant of 1850, and that by legislative enactment, the State of Iowa, on the 18th of January, 1853, granted the land in controversy, together with all other

swamp lands situated within Greene County, to the said Greene County, and that by mesne conveyances, the Marshall Dental Manufacturing Company were the owners at the time of the bringing of this suit, of the land designated in the plaintiff's petition.

By way of cross petition the Marshall Dental Manufacturing Company sets up its title to the land in controversy, alleging that by mistake or otherwise, the land was excluded from the government survey of 1853. That said land was swamp and overflow land, that the Marshall Dental Manufacturing Company was the owner thereof, that said Manufacturing Company claimed ownership under the Act of Congress of September 28, 1850, and under the rules and laws pertaining to the survey of the public domain, praying that their title be quieted as against the plaintiff.

There is little dispute as to the facts in the case. The Supreme Court of Iowa in discussing the character of the so-called lake stated:

"It is several hundred acres in extent and, as the evidence shows, has a well defined bank or rim. The water is and always has been shallow, varying in depth with the falling of rain and the melting of snows. It is surrounded by highlands which drain into it and has no outlet save a swale through which the water flows out when the bed fills. Much of the time a large portion of the bed is overgrown with rushes, water lilies and other vegetation so that not more than one-fifth of the water in it is clear. In 1907 when the surveyor employed by the defendants surveyed it he found much of the bed so dry that he excavated at several places finding the vegetable mould on the bottom from twenty to thirty inches deep underlaid with one to six inches of sand with clay below. The surveyor employed by the plaintiff thought much of the bed covered with water when he examined it during the same year. The evidence indicates that

during the dry portions of the season the water in the lake is from eighteen inches to five or six feet deep and grass covers much of the bed and that when the bed fills so as to overflow it is from three or four to eleven to sixteen feet deep. Boats and skiffs have been kept on the lake for hunting and fishing purposes since the early days of settlement. It can not be said with any degree of accuracy from the photographs from how much of the bed the water recedes but the condition of vegetation on the bottom indicates much of it becomes dry during the dry season."

In addition to this statement of the court, the evidence further discloses that the so-called lake had no springs or other subterranean supplies; that there is no inlet other than the surface drainage of the surrounding country; that there is a low depression spoken of as the outlet, from which water flowed during the spring and in wet seasons; that this was its substantial condition for about thirty-five years prior to the trial of the case except that for the past ten or fifteen years it has been practically dry; that at the present time it is entirely covered with slough grass and rushes, with very little water, and that the water can be seen in a very few places through the grass. The witnesses liken it to the "ordinary prairie slough or pond." The water has never for any length of time come out to the meander lines.

The evidence shows that the defendants, Marshall Dental Manufacturing Company, by mesne conveyances own the land in controversy, provided it is swamp and overflowed land within the meaning of the Swamp Land Grant of September, 1850.

It is disclosed that plaintiff in error, the Marshall Dental Manufacturing Company, were at the time of the commencement of this action and the issuance of the temporary restraining order engaged in digging a ditch to drain the so-called lake.

It is shown that in September, 1903, the Marshall Dental Manufacturing Company made application to the Department of the Interior for a re-survey of the bed of the so-called lake. That with said application there was filed with the department the petition of many citizens of Greene County stating that the bed of the so-called lake was marshy and a malaria swamp; that it was a menace to the health of the inhabitants of Greene County living near it.

The application of the Marshall Dental Manufacturing Company was denied by the secretary of Interior in a lengthy decision in which he held that the showing made by the Marshall Dental Manufacturing Company was not sufficient to prove that a mistake was made in the original survey in meandering the so-called lake. In the next to the closing paragraph of the decision denying the application for a re-survey, the Secretary of the Interior said, "as no sufficient proof has been submitted to impeach the correctness of the survey attacked, the application is denied, thereby determining so far as lies in the power of the Department, that the lands in controversy are not public lands."

In the last paragraph of the decision, the Secretary of Interior points the applicant in that case, being the plaintiff in error in this case, to the court for redress in the following language:

"In this connection it may be well to call attention to the decision of the court in *Railroad Company vs. Smith*, 9 Wall., 95, holding that in a proceeding before the courts, it is competent to prove by witnesses who know the land that it was swamp and overflowed land within the meaning of the swamp land grant. In *French vs. Fyan*, 93 U. S. 169, oral testimony was offered to impeach the validity of a patent to lands under the swamp lands, relying upon the authority of *Railroad vs. Smith*. The court rejected the testimony, holding that the issuance of the patent was conclusive of that question. The

decision of the lower court was affirmed upon the ground that the act making the grant conferred upon the Secretary of the Interior, the power to determine what lands were of the description granted by the act and made his office the tribunal whose decisions on that subject were to be controlling. It was held that the decision in *Railroad Company vs. Smith*, was not in conflict with the principle and parol evidence was held in that case, competent to prove the character of the land because the Secretary had refused to make a selection or list of such lands and would issue no patent. The court said there was no means by which it could compel the Secretary to act, 'and if the party claiming under the State in that case, could not be permitted to prove that the land which the State had conveyed to him as swamp land, was in fact such, a total failure of justice would occur, and the entire grant to the state might be defeated by this neglect or refusal of the Secretary to perform his duty.' "

"If the doctrine announced in *Railroad vs. Smith*, can be applied in any case, it surely must apply in this so that the grantees of the state are not remediless because of the refusal of the department to survey the land."

The above quotation is of importance because of the claims of Defendant in error that the decision of the Secretary is final and binding upon the courts while the plaintiff in error contends that the decision in fact points to the court as the place to adjudicate this controversy.

Upon the filing of the petition by the State, the district court isued its injunction, and thereafter upon the trial of the case, made the temporary injunction permanent, and the Supreme Court affirmed this decision.

SPECIFICATION OF ERRORS.

I. The plaintiff in error, as shown by the printed record, assigns some fifteen errors in the decision of the court below. In the brief we shall combine some of these in the interest of brevity of discussion. The first, second, third, fourth, fifth, sixth, seventh, ninth, tenth and eleventh assignments of errors, on pages 63 and 64 of the printed record may be epitomized by saying that the supreme court of Iowa erred in holding that the so-called body of water was proper to be meandered and was properly meandered by the government surveyors under the laws and rules governing the government surveys. The court erred in construing the act of Congress of September 28, 1850, (Swamp Land Grant) that said act did not grant the title to the land in controversy to the State of Iowa, and in construing that grant as not including land until it was surveyed, selected and patented, and in holding that under that act the selection and patenting of the land in controversy was a condition precedent to the plaintiff's asserting title to the land, and in failing to establish and decree the title to the land in controversy in the plaintiff in error.

II. The court erred in deciding that in its sovereignty as a state, the defendant in error became the owner of, or interested in the title to the land in controversy, and in holding that as a sovereign state it could interfere in any manner with the disposal or transfer of the public domain belonging to the United States government, as shown in error set forth in No. 8, Page 64, printed record.

III. Numbers twelve, thirteen and fourteen of the assignments of error on page 64 of the printed record, may be combined in the statement that the supreme court of Iowa erred in holding that it had title or interest in the land in controversy, being the bed of the so-called navigable lake, that said court had authority over the subject-matter of the land in

controversy, and that the court erred in holding that the so-called lake had any public value as a body of water.

BRIEF AND ARGUMENT.

Law of Iowa.

In view of the decision of this court with reference to the title to the beds of non-navigable lakes, it becomes of primary importance in considering the questions here involved to determine the law of the State of Iowa with reference thereto as announced by the decision of its Supreme Court and the acts of its legislature. Without fear of contradiction we submit that there is just one case (the case at bar), decided by the supreme court of Iowa, which has a tendency to deny the swamp land claimant's ownership in the beds of lakes that have dried up or have become so shallow as to be non-navigable, and that there is but one legislative act of the state which has a tendency to deny the title of the swamp land claims to the beds of such lakes, and that was the act of the 30 General Assembly of the State of Iowa passed in the year 1904, hereafter quoted in part. In other words, the decisions of the supreme court of Iowa have been a practical invitation to individuals to purchase the swamp land title of the beds of non-navigable lakes, and this has been the situation until recent years and until after the plaintiffs in error here had acquired their title.

We quote briefly from three decisions of the supreme court of Iowa, wherein they state the facts the court finds to be true with reference to the beds of non-navigable lakes.

In *Rood v. Wallace*, decided by the supreme court of Iowa, May 26, 1899, the contention was as to the title to the bed of Owl Lake, lying in Humbolt County, Iowa. The court in that case sustained the claim of the owner of the

swamp land title, and in describing the character of the body of water over the bed of the lake, stated:

"At some places this lake had well-defined banks and shore lines, and at other places it had no banks, but diverged into a slough or low, wet lands. It had some clear water, but, as a general rule, was filled with rank weeds, water lillies, and rushes. In the year 1884, plaintiffs dug a ditch, which drained off much of the water, and in the year 1894 this ditch was deepened and widened, with the result that the land is now almost wholly fit for cultivation. * * * Some of the witnesses describe it as a shallow lake, while others say that it was a marsh or swamp land."

The testimony upon which the foregoing facts were found discloses that the drainage ditch was five or six miles in length, and five or six feet in depth, and sixteen feet deep through the bank of the lake; that the waters of the lake were twenty feet deep with many fish therein, and that there was no perceptible difference in the depth of the lake until the ditch was done, yet the swamp land title was sustained.

Rood v. Wallace, 109 Ia. 5; 79 N. W. 449.

In the case of *Noyes v. Collins*, decided by the Supreme Court of the State of Iowa on the 14th of December, 1894, the court sustained the title of the swamp land owner to the bed of a meandered, non-navigable lake. We quote sufficiently from that decision to disclose the Iowa law as evidenced in decisions of the Supreme Court of Iowa.

"What was known as 'Dry Lake' was in part on Section 15, and was a body of water from 5 to 7 miles in length, and from 80 to 100 rods in width. Its depth was from 3 to 7 feet. * * * Because of ditches made by Harrison County, and the action of the Missouri River in washing away its banks, and of its waters spreading into Dry Lake and depositing large quantities of earth, the lake, about 1881, ceased to be.

What was the bed of the lake, has been, by the county divided into lots and sold, and the defendant owns, in pursuance of such a sale, lot lumber 7."

Noyes v. Collins, (92 Ia. 566.)

There are numerous other cases not reaching the courts, in which the governor of the state made application for patents under the Swamp Land Grant, for large areas of land composing the beds of non-navigable lakes, and where the government of the United States, upon such application, patented the lands to the state. This seemed to be the settled policy of the State of Iowa with reference to the title to the beds of non-navigable lakes that had dried up or become drained, down to 1904, when the legislature of the state, under the title, "Meandered Lakes and Lake Beds," passed an act, the first section of which is as follows:

"Sec. 1, *Survey and sale authorized.* The executive council of the state is hereby authorized and empowered to survey the meandered lakes and lake beds within this state, and sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the state and what meandered lake beds belonging to the state may be drained, improved, demised or sold."

Other sections of this act covered the details with reference to the survey, notices to be given, and hearings to be had under such notices, employment of engineers to drain, sale of the land, executing of deeds or patents after appraisement, and provided that the property owners of land abutting on said lake, should have the first right to purchase the land at the appraised value.

We now call the attention of the court to the language of the Supreme Court of the State of Iowa, in the case of *Carr v. Moore*, in its decision rendered January 24, 1903, wherein that court held the bed of a non-navigable, meandered lake

to be swamp and over-flowed land. Comparing the finding of facts in the two cases, as found by the Supreme Court of Iowa, more clearly places the land in controversy here in the class of lands granted by the Swamp Land Grant, than the bed of the lake involved in the case of *Carr v. Moore.*

CARR vs. MOORE,
Decided January 24, 1903.
(Quoting from Decision.)

The controversy relates to portions of the bed of what was at one time known as "Iowa Lake" * * * in extent about a mile and a half each way, of very irregular outline, with a shore line of over six miles and an area of eight hundred and eighty-five acres. * * * About ten years after the survey, although previous to that time it had contained water, the so-called lake became practically dry during one season. Subsequently it refilled with water; but around its margins, and during some seasons throughout its entire extent, with the exception of perhaps one or two places where there was considerable depth of water (at one of these deeper points there is still a so-called pond), it was grown up with rushes and grass. It was swampy in character,—the bottom composed of prairie mud and a peaty substance. It had no definite shore line, but the ground around it sloped gradually down to and under the water. When full of

CASE AT BAR.
Decided July 2, 1909.
(Quoting from Decision.)

"Goose Lake is that portion of Sections one and twelve in Township eighty-four, and of Section 36 in Township eighty-five north of Range No. thirty-one, west of the 5th P. M., and of Sections six and seven in Township eighty-four of Range thirty, west of the 5th P. M., meandered by the government survey of 1853. It is several hundred acres in extent and, as the evidence shows, has a well defined bank or rim. The water is and always has been shallow, varying in depth with the falling of rain and the melting of snows. It is surrounded by highlands which drain into it, and has no outlet save a swale through which the water flows out when the bed fills. Much of the time a large portion of the bed is over-grown with rushes, water lillies and other vegetation, so that not more than one-fifth of the water in it is clear. In 1908, when the surveyor employed by defendants surveyed it, he found much of the bed so dry that

water, the depth over its entire extent with the exception of the one or two deeper places above referred to, did not exceed five or six feet, and it was shallower in the central portion; its greatest depth being along its sides. It had no springs or other subterranean sources of water supply, nor did it have any definite inlet, the water coming into it in the wet season from the general surface drainage of the surrounding country. It had a shallow outlet, called a creek, through which water flowed from it when it was filled. * * *

From what had already been said, it is apparent that there was at the time of the original survey no lake, in the proper sense of the term, such as to give occasion for the application of the doctrines of accretion and reliction. While the evidence does not go back to the exact situation of affairs when the survey was made, it does indicate the general nature of this body of water at a time so proximate to the date of the survey as to enable us to know with sufficient definiteness what its character was at that time."

After this decision the Governor of the State of Iowa made application for Patent under the Swamp Land Grant for the land in controversy and patent was duly issued. *Carr vs. Moore*, 119 Ia., 152.

he excavated at several places, finding the vegetable mould on the bottom from twenty to thirty inches deep, underlaid with one to six inches of sand, with clay below. The surveyor employed by the plaintiff thought much of the bed covered with water when he examined it during the same year. The evidence indicates that during the dry portions of the season the water in the lake is from eighteen inches to five or six feet deep, and grass covers much of the bed; and that when the bed fills so as to overflow it is from three or four to eleven to sixteen feet deep. Boats and skiffs have been kept on the lake for hunting and fishing purposes since the early days of settlement. It cannot be said with any degree of accuracy from the photographs from how much of the bed the water recedes, but the condition of vegetation on the bottom indicates much of it becomes dry during the dry season."

We here call attention to the testimony of surveyor Bean on page 19 of printed record identifying exhibits No. 6 to 17 inclusive. These exhibits (pages 20 to 26 of record) are photographs giving a birds-eye view of the entire bed of the so-called Goose Lake. Exhibits D to H inclusive are photographs of small portions of the bed of the lake showing some surface water.

It is difficult to read the finding of facts in the above parallel statements and find therefrom sufficient evidence in the condition of the two non-navigable meandered lakes, as would justify the different ruling in the two cases. After long years of recognition of the act of September 28, 1850, (Swamp Land Grant), as embracing and covering the beds of non-navigable lakes that dried up or were drained, the decision in the case at bar conclusively recognizes the purposes of the act of the Iowa legislature heretofore referred to, wherein that body assumed ownership in the state of the beds of non-navigable lakes and authorized its officers to survey and sell the same.

By what legal right may the state of Iowa sell for the benefit of the state, lands which in the language of this court "the United States assumes the position of a private owner, subject to the general law of the state so far as its conveyances are concerned".

Hardin v. Shedd, 190 U. S. ; 47 L. Ed. 1156.

TITLES TO THE BEDS OF LAKES.

In the case of *Whitaker v. McBridge*, Mr. Justice Brewer delivered the opinion of the court, affirming the decision of the supreme court of Nebraska in sustaining the title of the riparian owner. The supreme Court of Nebraska had relied upon the case of *Hardin v. Jordan*, 140 U. S. 371; 35 L. Ed. 428. In rendering its opinion, this Honorable Court was particular to call attention to the fact that the United States was not a party to the suit, and that the decision was not to be considered as the determination of the power of the government to order a survey of the land in question.

This Court said: "As we reserve the rights of the United States we do not even impliedly sanction the intimation contained in the opinion of the court below that, under the de-

cision in *Hardin v. Jordan*, 140 U. S. 371; 35 L. Ed. 428, 11 Sup. Ct. Rep. 808, 838, although, on non-navigable waters, riparian rights were not conferred by the state law, nevertheless the land beyond the banks passed to the state in virtue of the patents of the United States to the lot owners. Upon that question we express no opinion."

Whitaker v. McBride, 197 U. S. 512; 49 L. Ed. 860.

It does not fall that because a body of water was once navigable, that it has continued to remain so. Whenever, from any natural cause, this practical utility as a means of transportation has been disturbed, it should cease to be classed among those waters that are charged with public use.

Harrison v. Fite, 148 Fed. 781.

It is elementary that the United States is the owner of the public domain, however acquired, and that this ownership is without condition. This principle was epitomized by Chancellor Kent in the following language: "Upon the doctrine of the court in that case *(Johnson v. M'Intosh*, (1823) 8 Wheat. 543, 5 L. Ed. 681) and in that of *Fletcher v. Peck*, (1810) 6 Cranch, 142, 143, 3 L. Ed. 179, 180, the United States own the soil as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and all of the productive funds which those lands may hereafter create. The title in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual States."

Kent's Com. Vol. 1, 257.

Irvine v. Marshall, 20 How. 558; 15 L. Ed. 994.

It is also so well established as to need no elaboration, that all land covered by water, within the public domain, is owned by the United States.

Illinois C. R. Co. v. Chicago, 176 U. S. 646; 44 L. Ed. 622.

There can likewise be no question at this time that upon the admission of a new state the ownership and power over lands within its borders covered by navigable waters passed to the state, and that this right is secondary only to the paramount right of the government in the exercise and control of commerce with foreign nations and interstate commerce.

Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565.

As to the land under navigable waters, there is no longer any question, but what rights in the use of the water or the land under them must be determined with reference to the law of the state in which such navigable waters are situated, and that the state law will be sustained except it should interfere with the power of the United States government with reference to commerce.

Barney v. Keokuk, 94 U. S. 324; 24 L. Ed. 224.
St. Louis v. Myers, 113 U. S. 566; 28 L. Ed. 1131.
St. Louis v. Rutz, 138 U. S. 226; 34 L. Ed. 941.

Now our question here is whether the rule with reference to the rights of land covered by navigable waters shall apply and ought to apply to lands covered by non-navigable waters. We have observed that the title to lands covered by non-navigable waters is in the United States and that the United States has the power to dispose of them.

This the government has attempted to do, first, by the rectangular system of survey, beginning very shortly after the formation of the government of the United States, necessarily a preliminary condition to the sale and disposition of the public domain, necessary in order to designate and describe the public domain, and we submit as an elementary proposition that it has never been the intention or purpose of Congress to indiscriminately dispose of the public domain, or any portion of it, except where the land had been

previously surveyed and designated and that as to all other land not surveyed and designated the title remains in the United States government, subject to such further and future action as the congress shall determine.

SOVEREIGN POWER.

We assume that there will be no contention in this case, on the part of the State, but that the rights, title or interest of the State to the land in controversy must come under its power as a Sovereign State; in other words, it nowhere appears that the State now has, or claims to own the bed of Goose Lake under a grant from Congress, or under a patent from the United States Government. If the land passed under the Swamp Land Grant the State has disposed of it to the grantor of the plaintiffs in error. If it did not pass under that grant there is no other grant from the United States Government under which the State can suggest a title.

In all governments of constitutional limitation "Sovereign Power" manifests itself in but three ways; taxation, eminent domain and police power. If the contention of the State as to its ownership of the land in controversy is sustained, does it come under the exercise of its "Police Power" which is an attribute of sovereign power to enact laws for the exercise of such restraint and control of a citizen as to his occupation as may be necessary to promote the health, safety and welfare of society. Clearly not.

Price v. People, 55 L. R. 577.
U. S. v. Douglass-Sartoris Co., 3 Wyo. 287.

Does the State's interest in the land arise under the exercise of its sovereign power with reference to taxation, which is a power to levy taxes to provide money for public purposes?—Clearly not.

Citizens Savings Association v. City of Topeka, 87 U. S. 555.

We then turn to the right of eminent domain which is a sovereign authority to control and regulate these rights of a public matter which appertain to its citizens in common and to appropriate and control individual property for the public benefit as safety, necessity and welfare demand.

Cherokee Nation v. S. A. R. R. Co., 33 Fed. 900.

The sovereign right to control the tide lands, as well as lands under navigable waters within their boundaries, has been established by so many decisions as to need no citation or discussion.

In states following the common law rule as to riparian ownership, the title to the soil under non-navigable water is in the riparian property.

Tyler v. Wilkinson, 4 Mason (U. S.) 397.
Mitchell v. Smile, 140 U. S. 406.

In states which do not follow the common law as to riparian ownership, the title to the soil under non-navigable waters is in the United States.

Hardin v. Shedd, 190 U. S. (47 L. Ed. 1156).
Rood v. Wallace (Ia.) 79 N. W. 449.
Grant v. Hemphill, 96 Ia. 218.
Carr v. Moore, 119 Ia. 157.

The title to the soil under the non-navigable inland lakes of Iowa passed to the state under the swamp land grant.

Rood v. Wallace (Ia.) 79 N. W. 449.
Carr v. Moore, 119 Ia. 157.

Upon the creation of new states out of the national domain, unappropriated lands within their borders have not been transferred to them by the original owner, the National Government; whatever title to lands the states have acquired must come through the Congress of the National Government in accordance with the Constitution thereof, which declares:

"The Congress shall have power to dispose of and make all needful regulations respecting the territory or other property belonging to the United States."

Constitution, Art. 4, Sec. 3.

The act of Congress, admitting the states of Iowa and Florida to the Union, approved March 3rd, 1845, declared:

"The said states shall never interfere with the primary disposal of the soil within the same, by the United States."

The supplemental act pertaining to the admission of Iowa to the Union, approved March 3rd, 1845, declared:

"The State of Iowa will never interfere with the primary disposal of the soil within the same, by the United States."

If then we are to determine the right of the State to the ownership or control of the land in controversy by reason of its power under its sovereignty where is the evidence to establish a fact upon which to determine that such right or power is here called for? If we read carefully the language of the decision of the Supreme Court of Iowa in the case at bar we are driven to the inevitable conclusion that the so-called Goose Lake does not now possess one single attribute, and that there is not one single contention surrounding it to even suggest that it comes under the control of a sovereign power.

We find in a late decision of the Supreme Court of the United States, a declaration directly touching the issue involved in this case. Mr. Justin Holmes delivered the opinion of the court in the case of *Hardin v. Shedd:*

"The claim of the plaintiff in error, to the land below the original water line, depends on its being passed by the patent of the United States. The patent to Holbrook, from which

they derive an important part of their title was stated May 20th, 1851, long before the swamp land act. (9 Stat. at L. 519, chap. 84.) At that time the land under the lake, as well as that surrounding it, belonged to the United States, and, if grants of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded by a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded by navigable waters. In the latter case, the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument, that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land, will be determined by the law of the state where the land lies. In the case of land bounded on a non-navigable lake, the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned."

Note the language that the soil under non-navigable lakes belongs to the United States, while the soil under navigable waters belongs to the States; Continuing:

"When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state, which does own it that it is attached to the shore. The rule as to conveyances bounded by non-navigable lakes, does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the swamp land act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference because we fear that there has been some misapprehension with regard to the point."

In other words, the National government is the owner of all the land within the boundaries of its territories. When by

its consent a state is organized, title to that portion of the land under navigable waters is vested in the new sovereign state, not by grant, but the sovereign power is transferred by its admission to the Union of States, as to all other lands including the soil under non-navigable lakes the state has no title except by grant, and the only grant heretofore made by congress, which could possibly operate to pass title to such land is the swamp land grant; it does not follow that, because the national government has acquiesced in the law of the states following the common law as to the title of riparian owner, that it has thereby recognized title *in the state* to such land. If the State of Iowa followed the common law as to riparian ownership of land under non-navigable waters, then the general government would waive its ownership and confirms the riparian title.

Hardin v. Shedd, 190 U. S. ---- (47 L. Ed. 1156.)

To put it in another way, the common law as to the title of the riparian proprietor whose land bordered on the non-navigable lake or stream, is that he owns the soil under the water. The General Government in such states, consents to the rule and asserts no claim but waives its title. Thus two things are necessary to confirm the title of the riparian owner to the soil under non-navigable waters. First, the law of the state. Second, the acquiescence by the general government. But it will be noted that at no time is title lodged in the state, and the state at no time passes title to the adjacent owner. The title was in the government of the United States. It granted title to the adjacent land and then in recognition of the state law as to riparian proprietorship, concedes the grant of the adjacent land carried with it the title of the submerged land.

The law of Iowa gives the riparian owner title to high water marks only, in so far as the non-navigable lakes are

concerned. It therefore follows that when the government grants title to the adjacent owner, it does not pass title by that grant to the submerged soil, and in the case above cited, it was held by this court, that the title remained in the general government unless as we claim in this case, it had passed to the state under the swamp land grant.

CHARACTER OF THE LAND IN CONTROVERSY.

That the surveys in the northern and western parts of the State of Iowa, made by the General Government between the years of 1850 and 1860, were, in many instances, improperly made, and especially so in respect to the running of the meander lines of alleged lakes, is so well established by numerous presentations to the courts also to the Department of the Interior as to need no assertion. Whether the method of payment for surveys in vogue at that time, under which a very much larger compensation was paid for establishing meander lines than for the surveying of straight sectional lines, had any bearing, we do not assert, but one thing is true, and that is, that in the early days, before the soil was cultivated and public roads established and worked, over a large portion of the State of Iowa in the spring of the year would be found large ponds of water, which in a little while would entirely dry up. The wet and overflowed condition of the land in Iowa and other states, commonly described as "table and flat land", was the basis of the act of Congress of 1850, granting to the state all the swamp and overflowed lands, the object of the grant being that the lands which were overflowed might be drained and reclaimed for agricultural purposes. It is certainly true that unless a body of water is of a permanent character, it has no value as a body of water. The Interior Department recognized the fact that shallow ponds or lakes which are easily drained or likely to dry up, would be

more valuable for agricultural purposes than as bodies of water, and hence the instructions to surveyors, that they were only to meander bodies of water of twenty-five acres and upwards that would not be easily drained or were not likely to dry up.

It is well known and within the knowledge of everyone that in a new country, and especially in a country where the land is flat and where the rainfall is as great as it is in Iowa, that the waters accumulating from the melting of snow and the thawing out of the ground in the spring, together with the heavy rains, leave a very large amount of water gathered in the depressions of the soil, and that for the time being, these waters present a formidable appearance as lakes. This was the condition of Iowa when the surveys were made in the northern and western portions of the state, and it was these bodies of water (which were erroneously meandered as lakes, by the surveyors) that have given rise to the numerous cases in court and before the Department of the Interior, involving title to the beds of so-called lakes.

During the earlier days after the surveys, when there was a great deal of public land in Iowa which could be entered under the various laws for the disposal of public lands, these mistakes in surveys did not receive much attention. The reason is apparent, so long as there was surveyed land which could be entered and obtained from the Government or which could be purchased at a low price, no one became sufficiently interested in the land that had been erroneously meandered as being a part of a lake, to bring the attention of the Department of the Interior to the mistake. It was only when the public lands of Iowa had been practically exhausted and the price of land increased beyond $2.50 and $5.00 per acre of the earlier history of the state, that persons commenced to look upon the land embraced in the meander lines of the so-called lakes and to investigate their titles. The first case to

receive serious consideration was that of a large tract of land which had been erroneously meandered as a lake and designated as Cairo Lake in Hamilton County, Iowa. It was shown that the so-called Cairo Lake was a tract of land of about thirteen hundred acres; that during the spring of the year the land would be covered by a body of water from two to eight feet deep; that during the summer and fall of the average year, the water would run off, evaporate or soak into the soil, leaving the land in a swampy, marshy, boggy condition. The attention of the Governor of Iowa being brought to its condition, he promptly applied to the Interior Department for a re-survey of the land, and it was found that the character of the land came within the description of land intended to be covered by the act of September 28, 1850, (the swamp land grant) upon request of the governor the land was re-surveyed and patented to the State of Iowa under this grant, and has since that time been bearing its proportion of taxes and had a legal ownership.

Another case which has received attention at the hands of the courts and of the Interior Department is that of a large tract of land embracing something over two thousand acres of land, situated in Palo Alto County, Iowa, which was originally meandered as being a portion of Lost Island Lake. Investigation discloses that Lost Island Lake is a lake about two miles wide and about three and one-half miles long; that the waters are from ten to thirty feet deep. It embraces about seven hundred acres of land. As originally meandered by the Government Surveyor, instead of embracing seven hundred acres it embraces some twenty-eight hundred acres. There are over twelve hundred acres on the north side of the lake and about nine hundred acres on the south side of the lake which was placed in the lake by the Government survey made in 1855. In 1890, Hemphill and others settled on that portion of the land which had been erro-

neously meandered as a lake situated on the north side of Lost Island Lake. They erected small houses on the land and commenced cultivating it. They filed applications in the Land Office at Des Moines, Iowa, to enter the land as homesteads, and at the same time made application to the Interior Department for a re-survey of the land. This application was rejected together with their applications to enter the land as homesteads. Suit was brought in the courts by the adjacent owners wherein they sought to eject the settlers from the land, to enjoin them from cultivating it or interfering with the possession of the adjacent owners, and to quiet title in the adjacent owners under the riparian law. The case was tried in the District Court of Palo Alto County and a decision of that court rendered, granting the entire prayer of the plaintiff. The defendants were ejected from the land and enjoined from cultivating it and the title quieted in the adjacent owners. An appeal was taken to the Supreme Court, and after reviewing the evidence submitted, in a lengthy decision, that court reached the following conclusion:

"We hold that all of the land in dispute is a part of the unsurveyed domain of the United States to which no one can obtain title except through the regular Government methods adopted by the General Government for the disposal of public lands."

Grant v. Hemphill, 92 Iowa, 218.

This decision of the Supreme Court was rendered in 1894. Immediately after the decision had been rendered, the settlers again moved on the land and cultivated it for some three years when they again applied to the Interior Department to enter the land under the homestead law, and again applied for a re-survey of the land. They bottomed their second application for re-survey upon the decision of the Supreme

Court of Iowa above referred to. Upon the filing of the last application for survey, the Secretary of the Interior directed an examination to be made of the land. His decision was in part as follows:—

"The applicant alleges that the meander lines of said lake are wholly wrong; that from the configuration of this land there is not now and was not at the time of the official survey, any reason or fact that could be construed as justifying the meander lines as established. The case of *Grant v. Hemphill*, 92 Iowa, 218, is cited in brief of counsel for applicant, which involves a greater portion of Section 19, wherein it was held by the Supreme Court of Iowa that the land is not now and probably never was any part of a lake. In *Noyes v. Collins*, 92 Iowa, 566, the Supreme Court of Iowa held that the title of riparian owners does not extend beyond the natural shore. In view of the showing made and the decisions of the Supreme Court, it is deemed proper to institute an inquiry into the facts. You are, therefore, directed to send a special agent to the locality to make special examination into the land in question, the position of the lake past and present, and submit his report, when made, to the department."

Secretary's Decision, March 8, 1898, 26 L. D. 319.

Acting upon the direction of the Secretary, the Commissioner of the General Land Office sent A. W. Barber, special agent and civil engineer, to make the examination. With Mr. Barber's report included plat and field notes of twelve hundred and thirty acres which he found had been erroneously included as a part of Lost Island Lake, and he recommended that the field notes and plat be accepted and approved and the land disposed of as provided for the disposal of public lands.

In passing upon this report of Mr. Barber, the Secretary said:—

"Mr. Barber states that he has arrived at the conclusion that the land in Sections 19, 20 and 30 Township 97, Range

34, and a portion of the land in Sections 25 and 36, Township 97, Range 35, was erroneously returned by the deputy surveyor in 1855 as covered by lakes; that there is no reasonable doubt that the pretended meandering of the lake was improper and almost wholly fictitious and that the land should have been surveyed and disposed of as public land. I see no reason why the survey executed by Barber should not be approved and the land disposed of as government land."

See Secretary's Decision, June 25, 1898, 27, L. D. 119.

After the disposition of these twelve hundred and thirty acres of land, one of the adjacent owners brought suit against the grantees of the State of Iowa under the swamp land grant, alleging ownership under the riparian law to a portion of the land included in the new survey. This case was tried in the District Court of Palo Alto County and the petition of the plaintiff granted. In the decree, the grantees of the State of Iowa were restrained from interfering with the plaintiff's possession of cultivating the land, and the title to almost two hundred acres of land included in the Barber survey was quieted in the riparian owner. The grantees of the State of Iowa (under the swamp land acts) appealed this case to the Supreme Court of the State. This case fairly presented the question as stated by the Supreme Court, as to what bodies of water should be meandered and what small lakes and ponds should be platted and surveyed. After quoting from Lester's Land Laws, Edition of 1880, 714, containing direction of surveyors, the Supreme Court of Iowa said:—

"That there was swampy and low land in Section 30, north of plaintiff's lots admits of no question, and in wet seasons, doubtless a part of it was covered at times with water; but we are equally clear that no permanent body of water of any considerable extent existed there."

The evidence in this case was undisputed that during the spring of the year the larger portion of the land involved in

that suit would be covered with water from two to six feet deep. The evidence also showed that the original government survey was made during the spring of the year and that the meander lines as run substantially conformed to the water line during the high water in the spring of the year; that during the summer and fall the water had run off sufficiently that the land would be grown up with tall, rank slough grass and that stock would feed on it during the latter part of the year. Summing up the questions of fact in the case, the Supreme Court says:—

"While it is true that the significant question before us is the condition that existed when the original survey was made, and that attempts to show this must usually involve much uncertainty, because of the great changes the lapse of time and cultivation of surrounding lands have made in the wet lands and inland waters, yet it appears beyond question here that the meander line was not correctly run in the first instance, and we think it is satisfactorily disclosed that no body of water necessary to be meandered then existed where Mud Lake is shown on the plat."

Schlosser v. Hemphill, 118 Ia. 442.

THE SECRETARY'S DECISION.

In the trial of this case below, counsel for defendant in error laid great stress upon the fact that the plaintiff in error, the Marshall Dental Manufacturing Company, had made application to the Interior Department for a survey of the land in controversy, and that the Interior Department had rejected the application, claim being made that by that decision it was settled that the land in controversy was not swamp and overflowed land, and therefore the defendants had no title. If counsel's position is true, and if the decision of the Secretary of the Interior has such effect, then the defendants herein are like unto the fellow who was pursued by the devil. In his flight he came to the deep blue sea, and

then found himself between the two. If he retreated the devil would get him, if he went forward it was into the deep blue sea. In other words, if the decision of the Secretary of the Interior is final, then these defendants who purchased this land at a time and with full knowledge that the State of Iowa, through its then governor, was doing all in its power to perfect the title of lands under the swamp land grant of the character of the land in controversy, who purchased the land with the full knowledge that through the efforts of the then governor of Iowa, Carro Lake, in Hamilton County, embracing some 1300 acres of land, which lake had been meandered, had been patented to the State of Iowa under the swamp land grant, the effect of that decision would be to absolutely refuse a day in court to plaintiff in error who in good faith expended their money in the purchase of land in controversy. But we turn to the decision of the Secretary of the Interior refusing the survey, and what do we find? That he bottoms his refusal not only upon his claim that the applicant had failed to make out a sufficient case, but upon the further claim of the protest of a later governor of the state of Iowa, against any action by the Interior Department, which would disturb the claim of the state to ownership in these lands. Further than this, the Secretary, in his decision, which counsel claims to be a final adjudication of the questions involved in this case, cites the authority of the Supreme Court of the United States, in more than one case, showing that where the Secretary had refused to take action looking to the settling of the question of title of swamp land claimants, the doors of the courts would open and had been made use of effectively for such claimants to have their rights redressed closes his decision by pointing these applicants to the door of the court in order to establish their claim in an action in the court, indicating that if their claim is once established and the decision of court obtained in support

of their contention, the Interior Department will then act as it did in the case of *Carr vs. Moore,* when after the court held the so-called lake to be swamp land, and without further inquiry or further survey, swamp land patent was issued to the state of Iowa for the more than 800 acres of land involved in that case. We have heretofore quoted the latter part of appellees' Exhibit "A", being the decision of the Seecrtary of the Interior in support of our position just stated.

THE MEANDER LINE.

The defendant in error's position as to the effect of the survey of the township and the excluding of the land in controversy from the survey and in designating it on the plats and in the field notes as a lake, is completely refuted by numerous decisions of this court, the contention is that by meandering the land and calling it a lake, it was segregated from the public domain and became the property of the state and that the state, in its sovereign capacity, is the present owner of all meandered lake beds in this state. We have discussed the question of the state's sovereignty and its powers as a sovereign state. At this time we want to call attention to the decisions on the question of the effect of the surveying department of the government having run meander lines in place of surveying the land in question.

Lester's Land Laws, (Edition of 1860, Page 714), directs surveyors to "meander all lakes and deep ponds. Shallow ponds, readily drained and likely to dry up are not to be meandered." A body of water was not rendered a lake by being meandered. A body of water dried down or refilled, according to the season, not over five or six feet deep except in a few places, filled with rushes and weeds, was not a lake, but swamp land.

Carr v. Moore, 119 Ia. p. 152; 93 N. W. p. 52.

In the case of the *French Glen Live Stock Co. v. Springer*, the question was as to whether certain lands meandered as a lake belonged to the riparian owner or to one who had homesteaded the land. It was contended that the fact of meandering was sufficient to establish the fact of the existence of the lake. The Supreme Court of the United States states: " We agree with the Supreme Court of Oregon in thinking that the question of whether the Northern boundary of the lots of the plaintiff in error was an existing lake * * * was a question of fact which was not concluded by the mere of the meander line."

French Glen Live Stock Co. v. Springer, 185 U. S. 46 Law Ed. 800.

In *Niles v. Cedar Point Club*, 175 U. S. p. 300, under a similar state of facts to the above case, this court held:

"It is urged that the fact that a meandered line was run amounts to a determination by the Land Department that the surveyed fractional sections bordered on a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in the fact of the express declaration of the field notes and plat; that that which was lying beyond the surveyed sections was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

Niles v. Cedar Point Club, 44 L. Ed. 171.

The surveys of the township in which the land in controversy is situated, stopped at the meander lines of the alleged lake. The field notes indicate that it stopped because the surveyor believed that there was a body of water which under his instruction should be meandered. Those instructions as shown by the record in this case were

"MEANDER ALL BODIES OF WATER OF 25 ACRES AND UP OF A PERMANENT CHARACTER, NOT EASILY DRAINED OR LIKELY TO DRY UP."

The theory upon which these instructions were given was that if a body of water of over 25 acres was of a permanent character, could not easily be drained and was not likely to dry up, it was more valuable as a body of water than for agricultural purposes. The opposite of this proposition is equally true, that it was the duty of the surveyor, as to all bodies of water that were easily drained or likely to dry up, to survey the same instead of meandering them. This placed the duty on the government surveyor of investigating the character of the body of water to ascertain if it was fed by springs and therefore would have a permanent supply of water; to determine if the inlets of the body of water were from a source that would be a permanent supply of water; if its outlets were of such a character as to affect its permanency; the depth of the water; the probability of its being drained, or, as the instructions put it, "easily drained"; whether under all the circumstances and conditions it was likely to dry up. If the surveyor who meandered the so-called Goose Lake would have made his investigation, what would he have found; that there were no springs to supply permanently the water in the so-called lake; that there was absolutely no inlets to the lake, except as the water would come in from all the adjacent land; that the banks were so low that as soon as the stage of water from four to six feet was obtained, it would run out over the banks; he would have found further that a ditch six to eight feet deep and less than a mile in length would completely drain the lake, and his own good sense would have disclosed to him that with the cultivation of the soil adjacent to this body of water, thus stopping the inflow of rainfall and melting snow from adjacent

land, would have resulted, as it has resulted, in the lake drying up. We need only to point to the facts that appear in this case to disclose that the surveyor made a mistake, or rather failed to do his duty by not putting forth the investigation suggested, and that if he had investigated, this case would not be in this court, because there would have been no meander lines run. These things have been considered by this court and the Interior Department in cases cited and others too numerous to mention, and each tribunal has invariably held that where the facts pointed, as they do in this case, to a failure of the surveyor to carry out his instructions, then and in such cases, his plat and field notes must yield to the facts and without disturbing the title to the land he did survey.

It seems persuasive to us that upon the whole case the decision of the Supreme Court of Iowa should be reversed. That if it is sustained it will be a recognition of the right of a state not only to interfere by legislative enactment and judicial decision with the disposal of the public domain belonging to the United States, but will be a recognition of the right to appropriate to its own use the public domain. We cannot believe that the rule whereby the United States government has recognized the law of the state in construing the extent and effect of claims under riparian rights should be applied in cases where there are no riparian rights, where there is no question of supporting the law of the state with reference to its conveyances, but where on the contrary the claim of the state is asserted on behalf of itself that it may sell a portion of the public domain for its own benefit. Neither can we believe that this court will take seriously the somewhat indefinite suggestion of the decision appealed from, that the land in controversy has now any public use whatsoever. Upon the facts in the case presented, we are persuaded there is no other conclusion than that this land

was of the character of land intended to be granted in the act of September 28, 1850, granting to the state of Iowa and other states the swamps and overflowed lands situated within her borders.

E. B. Evans,

Attorney for Plaintiffs in Error.

FILED
DEC 17 1912

Supreme Court of the United States

OCTOBER TERM, 1912.

NO. 104.

MARSHALL DENTAL MANUFACTURING COMPANY,

PLAINTIFF IN ERROR,

vs.

STATE OF IOWA.

GEORGE COSSON, ATTORNEY GENERAL, FOR APPELLEE.

BRIEF AND ARGUMENT FOR APPELLEE.

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BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The land in controversy comprises several hundred acres of ground; is generally known as Goose Lake; is located in the state of Iowa in Greene county.

The plaintiff in error, the Marshall Dental Manufacturing Company, proceeded to exercise jurisdiction over said lake antagonistic to the rights of the state by proceeding to drain said lake. The state of Iowa, through its attorney general, brought a suit in equity in the district court of Greene county, Iowa, to restrain the defendant from draining said lake, or otherwise exercising jurisdiction over said lake, alleging that the lake in question was duly meandered by the federal government

in its original government survey, and that the state of Iowa in its sovereignty was the owner in fee simple and had jurisdiction over all of the meandered waters of the state whether navigable or non-navigable.

The plaintiff in error, The Marshall Dental Manufacturing Company, in answer claimed title to said lake under the Swamp Land Act of 1850 through conveyances from the state of Iowa to Greene county, from Greene county to the American Emigrant Company, and other mesne conveyances. (Pages 4 to 8 Transcript of Record.)

The case was duly heard before the district court of Greene county, Iowa, upon depositions and oral evidence, and the court entered its decree on the 24th day of September, 1907, in which it was found that there is a body of water about one and one-half miles in length to three-fourths of a mile in width known as Goose lake; that said lake was meandered by the general land department in the original government survey of Greene county under an order and direction of the surveyor general and segregated from the public lands; that thereafter the Marshall Dental Manufacturing Company made formal written application to the secretary of the interior to have said Goose lake surveyed by the general land department, alleging as a ground therefor that said lake was not a body of water proper to be meandered at the time it was so meandered by the general land department, but was in fact swamp land; that after hearing, the secretary of the interior dismissed the application and confirmed the action of the surveyor general in meandering said lake and excluding the same from the public lands; and held that in so far as the interior and general

land department was concerned the matter was closed and the decision final; that no direct attack was ever made on said decision and finding of said secretary of the interior or the action of the general land department.

The court found that the action of the general land department in meandering the lake, together with the action of the secretary of the interior upon the hearing of the application of the Marshall Dental Manufacturing Company confirming and approving the action of the general land department, was binding and conclusive upon the court in a collateral proceeding.

The court further found, however, that Goose lake was a body of water proper to be meandered at the time it was so meandered in the original government survey of Greene county under the directions of the surveyor general.

The court further found that there was no evidence to show that the lands in question within the meander lines of Goose lake was ever listed, designated or included in the swamp lands of Greene county, and that therefore the defendants could not acquire any right, title or interest in and to said lands under the Swamp Land Act through mesne conveyances or otherwise, and that the defendants have no right, title or interest in and to said Goose lake, nor in any of the lands lying within the meander lines of said Goose lake.

The court further found that the title to said lake was in the state of Iowa for the use and benefit of the people and granted a permanent injunction against the Marshall Dental Manufacturing Company and other defendants in said case. (Transcript pages 59-60).

Upon appeal to the supreme court of Iowa (*State of Iowa vs. J. N. Jones, Frank Montgomery and the Marshall Dental Manufacturing Company, Appellants,* 143 Iowa, 398,) the decision of the lower court was affirmed. Our supreme court found that Goose lake was several hundred acres in extent and "has a well defined bank or rim. * * * The evidence indicates that during the dry portions of the season the water in the lake is from eight inches to five or six feet deep, and grass covers much of the bed, and that when the bed fills so as to overflow it is from three or four to eleven to sixteen feet deep. Boats and skiffs have been kept on the lake for hunting and fishing purposes since the early days of settlement."

The court, after quoting the rules of the land department, said: "Surely this lake comes within the description of bodies of water to be meandered, and, in view of the decision of the secretary of the interior, it should be regarded a non-navigable lake. To constitute such a lake, no particular depth is essential, nor is it necessary that the water cover the entire bed at all seasons of the year. It is at least enough if the body of water has well defined banks which are filled during portions of the year. It is apparent that the company has no legal title, although it was proceeding at the time the injunction was sued out to drain the waters from this lake by the excavation of ditches and the laying of tile. * * * The law is settled in this state that the owner of land bordering on a non-navigable body of water meandered by government surveyors has title to the water's edge, and not to the center of the lake, as is held in some states. (Cases cited). The rule in this state, as will appear from the decisions, is well supported by authority."

ERRORS ASSIGNED.

The plaintiff in its transcript assigns fifteen errors and in the brief these are grouped under three or four different heads. For the sake of clearness and brevity, we shall not follow the order of plaintiff in error.

It is the contention of the state that plaintiff in error should receive no relief in this court, for the reasons:

No federal question is involved.

There is no evidence to show that the land in controversy was ever listed by the general land department of the federal government as swamp land, but on the contrary there was an express finding in the court below, and in our own supreme court, that it was not so listed, and therefore could not pass under the Swamp Land Act to the state of Iowa and thence to Greene county and through mesne conveyaces to plaintiff in error.

The general land department and the secretary of the interior could alone determine primarily whether or not a body of water was of such character as proper to be meandered under the original government survey, and in the event that a finding is made by the secretary of the interior, his decision is final and conclusive and not subject to be assailed in the courts by a collateral proceeding.

Since the decision of this court in the cases of *Kean vs. Calumet Canal and Improvement Company*, 190 U. S. 452, and the case of *Hardin vs. Shedd*, in the same volume on page 508, it is beyond controversy that in matters of this nature, this court will follow the law of the state in which the land is situated.

If the decision of the secretary of the interior was subject to be assailed in a collateral proceeding of this nature, no relief should be granted by this court, for the reason the district court of Greene county who heard the testimony and arguments of counsel, after due consideration, found as a matter of fact that "There was no fraud or mistake in the action of the general land department in the meandering and segregating of said Goose lake. * * * That Goose lake was a body of water proper to be meandered at the time it was so meandered in the original government survey of Greene county under the directions of the surveyor general." (Transcript page 60.)

And this finding of the lower court was affirmed by our supreme court after a full examination of the facts and the law, the court speaking through Mr. Justice Ladd saying: "Surely this lake comes within the description of bodies of water to be meandered, and in view of the decisions of the secretary of the interior it should be regarded a non-navigable lake." (Transcript page 70).

And the finding of fact by the lower and appellate court of the state of Iowa should be controlling upon this court if there is any substantial evidence upon which to base said finding.

NO FEDERAL QUESTION IS INVOLVED.

It is clear from the transcript of the record and the argument of plaintiff in error that the Marshall Dental Manufacturing Company is not claiming by or through any patent from the United States government. The plaintiff in error is not claiming that the land in controversy was ever listed or selected by any governmental

officer, either federal or state, as a part of the swamp land which was deeded by the federal government to the state of Iowa by the act of 1850; on the contrary he admits that the land was meandered by the federal government and that upon formal action the secretary of the interior confirmed the finding of the general land department in meandering the land in controversy as a lake proper to be meandered. He therefore can have no claim of title except as he claims title by reason of the law of the state of Iowa with reference to the disposition of its swamp land and with reference to its jurisdiction over non-navigable meandered lakes. This being true, an adverse decision by the highest court of the state of Iowa left the plaintiff without any standing in this court.

Our supreme court in this case (*State vs. Marshall Dental Manufacturing Company*, 143 Iowa, page 400, near the bottom of the page) expressly found that no patent was ever issued from the United States to the state of Iowa for the land in question, and therefore if a part of the swamp lands remains in the general government, citing *Young vs. Charnquist*, 114 Iowa, 116; *Ogden vs. Buckley*, 116 Iowa, 352.

THE DECISION OF THE SECRETARY OF THE INTERIOR IS CONCLUSIVE.

The plaintiff has no standing in this court for the reason that the very tribunal constituted for the purpose of determining these questions has already determined the question at issue and adversely to the plaintiff; that is to say, the lake was duly meandered in the original survey and segregated from the public lands,

and upon formal application to the secretary of the interior, after a careful consideration of the evidence, the secretary of the interior found as a matter of fact that Goose lake was a body of water proper to be meandered, and held that so far as the decision of the secretary of the interior was concerned, the same was final and conclusive. The secretary found that "The field notes of survey show that there was a well defined lake covering the area indicated, at the time of the township survey in 1853. * * * It is not shown that in running the meander the deputy did not delineate the lake substantially as it actually existed." That the witness who testified corroborated the returns of the survey, that "it had a well defined rim"; that "there is no sufficient testimony to impeach the correctness of the returns, but on the contrary, the testimony of the several witnesses considered in connection with the returns of survey rather indicate that the bed of the lake has been gradually filled up since the date of survey, probably because of the cultivation of the surrounding lands".

The secretary further found that "If at the time of the survey, there was a well defined lake that was proper to be meandered, as shown by the field notes of survey, the department would have no authority to convey the lands as public lands, or certify and patent them to the state under the act of September 28, 1850," and that "the title to the bed of all lakes that were properly meandered vested in the state by virtue of its sovereignty and no reason can be perceived why the state cannot assume control of this land," etc. And further held: "As no sufficient proof has been submitted to impeach the correctness of the survey attacked here, the application is

denied, thereby determining so far as lies in the power of the department, that the lands in controversy are not public lands." (Transcript of Record, pages 33-36).

Except in the case of *Railroad Company vs. Smith*, 9 Wall., 95, where the secretary of the interior absolutely refused and neglected to take any action whatever, this court has invariably held that parol evidence could not be introduced to show the character of the land in question, and that the decision of the secretary of the interior was not subject to be assailed in a collateral proceeding.

In the well known case of *French vs. Fyan, et al.*, 93 U. S., 169, this court held that it devolved upon the secretary of the interior as the head of the department which administered the affairs of the public lands to determine what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling, and suggested that otherwise it would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey.

In the case of *McCormick vs. Hayes*, 159 U. S., 332, the precise question was before the court. Mr. Justice Harlan on page 339 stated the question thus:

> "The controlling question, therefore, in this case, so far as the plaintiff is concerned—and he must recover upon the strength of his own title, even if that of the defendant be defective—is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the state, under the Swamp Land Act, can

be shown by parol testimony to have been, in fact, at the date of that act, swamp and overflowed lands?"

And after reviewing at length the decisions of this court it was held that:

> "Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is inadmissible to show, in opposition to the concurrent action of federal and state officers, having authority in the premises, that these lands were, in fact, at the date of the act of 1850, swamp and overflowed grounds, which should have been embraced by Linn county in its selection of land of that character, and withheld from the state as lands granted expressly in aid of railroad construction within its limits."

It may be well to note in passing that this case was brought in error to this court from the supreme court of the state of Iowa.

In the case of *Rogers Locomotive Works vs. Emigrant Company*, 164 U. S., page 59, in error from the supreme court of the state of Iowa, this court said that it belonged primarily to the secretary of the interior to identify all lands that would go to the state under the act of 1850. When he made such identification then, and not before, the state was entitled to a patent, and on such patent the fee simple title vested in the state. The state's title did not become perfect until a patent was issued. That the county of Calhoun in the state of Iowa was a mere political sub-division of the state and could have no will contrary to the state but was subject to the paramount authority of the state, and that the action of the state was binding upon the county. The decision of the su-

preme court of the state of Iowa was reversed because it was said by this court:

> "The supreme court of Iowa did not give proper effect to the action of the interior department in 1858. It should have been adjudged that, so far as the lands in controversy are concerned, the plaintiffs claiming under the county of Calhoun and the state, as well as under the act of 1850, were concluded by the act of the secretary of the interior when he certified such lands as inuring to the state under the railroad act of 1856, and by the act of the state in accepting and retaining the lands under that act; consequently, the suit should have been dismissed for want of equity, with costs to the respective defendants."

To the same effect, see

Whitaker vs. McBride, 197 U. S., 510;

Knight vs. United States Land Association, 142 U. S., 161;

Cragin vs. Powell, 128 U. S., 691.

Our supreme court has consistently followed the holding of the supreme court of the United States and held that the decision of the interior department on the issue as to whether the land is of such a character as to bring it within the Swamp Land Act must be treated as a finality, and that the finding may not be assailed by parol evidence or in a collateral proceeding.

Young vs. Charnquist, 114 Iowa, 122;

Ogden vs. Buckley, 116 Iowa, 352;

Barringer vs. Davis, 141 Iowa, 419;

Rood vs. Wallace, 109 Iowa, 5.

It should be noted also that the American Emigrant Company, who claimed title under a conveyance from Calhoun county in contravention to the acts of the state of Iowa, is one of the original grantors from whom the

plaintiff in error, the Marshall Dental Manufacturing Company, claims title to Goose lake, the land in controversy in this suit. (See transcript pages 6 to8). And hence the claim of appellant as to prejudice because of innocence and mistake of the laws of the state is entirely without foundation.

GRANTS OF PUBLIC LANDS BY THE UNITED STATES BOUNDED UPON WATERS WILL BE CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE LANDS LIE.

This court has gone so far in holding that each state may control the sale and conveyance of lands belonging to the public within its own borders, that in the late case of *Frellsen vs. Crandell*, 217 U. S., page 71, the court said:

> "Obviously, in this case the supreme court of Louisiana followed the practice obtaining in respect to the public lands of the United States. But if it had not and had declared simply the law of the state of Louisiana its decision would, doubtless, be controlling on this court, for, in the matter of the sale and conveyance of lands belonging to the public no one state is obliged to follow the legislation or decisions of another state, or even those of the United States, but may administer its public lands in any way that it sees fit, so long as it does not conflict with rights guaranteed by the constitution of the United States."

In the case of *Kansas vs. Colorado*, 206 U. S., page 46 on page 93, the court said:

> "It is enough for the purpose of this case that each state has full jurisdiction over the lands within its borders including the beds of streams and other waters."

This was quoted with approval in the case of *McGilvra vs. Ross*, 215 U. S., page 70.

In the case of *Hardin vs. Shedd*, 190 U. S., 508, the court said that while there was a difference between land conveyed by the United States bounded on non-navigable lakes from that bounded on navigable waters, "nevertheless it has become established almost without argument that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned."

In the well known case of *Hardin vs. Jordan*, 140 U. S., page 371, on page 382, this court held that "It depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised."

It was also observed in that case on page 383 that in Iowa, "the government grant was held to extend only to high-water mark." On page 384 the court said:

> "We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

We do not now recall any decision where the proposition was even controverted, except where the evidence disclosed that claimants to the land in controversy were asserting title under a patent proceeding directly

from the United States on the one hand, and under a grant proceeding directly from the state of Iowa on the other hand.

THE LAWS OF IOWA.

If, then, this court follows the law of the state in which the land is situated, it would seem too self-evident for argument that the decision in question from which writ of error has been taken from our supreme court is not only the best evidence of the law of the state of Iowa, but ought to be conclusive as to the holding of our supreme court on this question.

This court in the case of *Hardin vs. Jordan*, 140 U. S., 371, decided that the law of Illinois was not in accordance with the decision from which writ of error was taken to this court, but the supreme court of the state of Illinois in the subsequent case of *Fuller vs. Shedd*, 161 Ill., 462, declined to follow the ruling of the court and emphatically declared that in the state of Illinois the title to submerged land in non-navigable meandered lakes was not in the riparian owners, but was held by the state in use and benefit for all the people; and this court in the case of *Hardin vs. Shedd*, 190 U. S., 508, recognized its error in assuming to hold the law of the state of Illinois was something contrary to the most recent utterances of that state as pronounced in the case of *Trustees of School vs. Scroll*, 120 Ill., 509, which case on writ of error in this court was entitled *Hardin vs. Jordan*, 140 U. S., 371.

We contend then that the law of the state of Iowa as pronounced in the case of *State of Iowa vs. The Marshall Dental Manufacturing Company, et al.*, 143 Iowa,

398, wherein the court held that the state of Iowa held all of the non-navigable meandered lakes in the state in trust for the use and benefit of the people for the purpose of fishing, boating and the like, and that the title of such meandered non-navigable lakes does not pass under the Swamp Land Act, and that therefore the plaintiff in error herein can have no interest in Goose lake under the Swamp Land Act, or otherwise, is controlling on this court. This case, however, is in harmony with the earlier decisions of our court.

Counsel for appellant in his brief and argument on page eight under the heading of "LAW OF IOWA" makes this statement: "Without fear of contradiction, we submit that there is just one case (the case at bar) decided by the supreme court of Iowa which has a tendency to deny the swamp land claimant's ownership in the beds of lakes that have dried up or have become so shallow as to be non-navigable, and that there is but one legislative act of the state which has a tendency to deny the title of the swamp land claims to the beds of such lakes," etc.

We respectfully state that counsel has misconceived the law of the state of Iowa. There is no decision of the supreme court of the state of Iowa which holds that the title to the beds of meandered non-navigable lakes passes under the Swamp Land Act.

In *Rood vs. Wallace*, 109 Iowa, page 5, on page 8, the court said:

> "We are quite ready to assume as a general proposition that title to all the lake beds in the state especially those of navigable lakes, is in the state, and that the general government never had any control or ownership thereof. Indeed, this seems to be almost the unbroken voice of authority."

A long line of decisions is cited in support of this proposition, including *Haight vs. City of Keokuk*, 4 Iowa, 199; *Noyes vs. Collins*, 92 Iowa, 566; *Hardin vs. Jordan*, 140 U. S., 271.

In *Carr vs. Moore*, 119 Iowa, 152, our supreme court, on page 156, said:

> "But in this state the title of abutting owners on waters which are meandered is held to extend only to high water mark, *the title of the bed being in the state.*"

In *State vs. Thompson*, 134 Iowa, 25, the court said:

> "The state became the owner of all lands forming the bed of the inland lakes within its borders which had been meandered by government survey and excluded from public lands as was the lake in question."

And upon the strength of this proposition, the Iowa supreme court granted an injunction in a proceeding brought by the attorney general in the name of the state of Iowa against the defendant Jones, who was proceeding to construct a ditch designed for the purpose of draining the waters from a meandered lake in Hancock county, Iowa.

What the supreme court of Iowa did hold in the cases cited by appellant herein was this: it was held in the case of *Rood vs. Wallace*, 109 Iowa, page 5, that the original government survey was not conclusive upon the federal government, but that upon application in which it was alleged that a mistake had been made in the original survey, the secretary of the interior had the authority to re-examine the question and order a new survey, and that if it was then found by the secretary of the interior that the land in question should not have been meandered as a lake, but that it should have been in-

cluded in the swamp land, and if it was then designated and listed as swamp land, that the decision of the secretary of the interior would be final. A long line of decisions of the supreme court of the United States was cited in support of this proposition.

After reviewing the decision, Mr. Justice Deemer, speaking for the court, said:

> "As the land department determined the lands in controversy to be swamp and issued its patent to the state accordingly, that determination is conclusive and the patent cannot be collaterally attacked." (Page 12.)

The court further held that when question arose as to the character of land such as that in dispute, "it was certainly competent for the governor to submit the matter to the only authority that had original jurisdiction in the matter, and having so submitted it, that decision is final. * * * That when there is a fair dispute as to the character of the land when originally surveyed, surely the land department has the right to determine the dispute, and, as a general rule, its decision is binding until set aside by direct attack."

Our court in that case also quoted from *Knight vs. Association*, 142 U. S., 161, as follows:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of the department within the scope of its authority is unassailable in the courts except by a direct proceeding."

Counsel in his argument seems to extract much consolation from the case of *Carr vs. Moore*, 119 Iowa, 152, but instead of the case of *Carr vs. Moore* furnishing any support to the contention of counsel, on the contrary

the doctrine of this case is conclusive against the contentions of appellant. In that case action to quiet title in certain tracts of land claimed as portions of the bed of the lake added to the lands of plaintiffs respectively by accretion or reliction, was brought in the district court of Hamilton county, Iowa. Defendant, by cross petition in each case, asked that the land in controversy be decreed to belong to him as owner under the swamp land grant. The court held that if there was a body of water proper to be meandered, the riparian owners would take to the water line; but if no such body of water existed, the meander line would constitute the boundary line of the riparian owners. The court further refused to quiet title in the plaintiff on the ground that he had obtained title to the land in question by accretion or reliction. As to the defendant's claims set up in his cross petition in which he claims ownership under conveyance of the bed of the lake as swamp land, the court said:

> "It is enough to say that he does not show any selection of the land by the proper department of the federal government, or recognition by it of the land as passing under the swamp land act. No doubt, the swamp land grant was a grant *in praesenti*, but the passing of title under the grant depends on a question of fact, which cannot be adjudicated by the state and its grantees for themselves. The determination as to whether the land is swamp land must be *in the first instance, by the proper department of the federal government;* and, until some determination has been made, the grantee claiming under the swamp land grant has only at best an inchoate right, not amounting to a title." Citing *Ogden vs. Butler,* 116 Iowa, 152, and held "that under the rule of law announced in that case, no relief could be granted to the defendant."

Counsel also directs your attention to the case of *Noyes vs. Collins,* 92 Iowa, 566, and states that the courts sustained the title of the swamp land owner to the bed of a meandered non-navigable lake. Again counsel is in error. The court did not sustain the title of the swamp land owner to the bed of the lake in question, but they expressly found that under the law of this state he was not entitled to the bed of the lake in question.

Section 15 in Harrison county, Iowa, was a part of the swamp land grant from the United States to the state of Iowa, and from the state of Iowa to Harrison county. The plaintiff in the action in question was the owner of Lot No. 6 of section 15. Within said section and adjoining the land of plaintiff there was a meandered lake which came to be known as Dry lake. Because of ditches made by Harrison county and the action of the Missouri river in depositing large quantities of earth in said lake, in 1881 the lake ceased to be. When the lake became dry it was divided into lots and sold by the county, and the defendant in said suit purchased Lot No. 7. The plaintiff in the action, the owner of Lot No. 6, who obtained his title under the swamp land act, claimed title to Lot No. 7 upon the ground that he was entitled to the additional adjoining land under the law of accretion. The court said that the law had no such application because it could not apply except where there was a gradual deposit of soil through natural causes or where there was a gradual recision of the water. The title was also claimed upon the theory that he was a riparian owner and took to the thread of the body of the lake. The court held that while this was the law in a number of the states, that "In this state (Iowa) no such rule has been applied

to lakes or ponds," and further proceeded: "Dry lake, as it was called, was meandered by the government surveyors, and nothing in the record indicates that in any of the conveyances of Lot No. 6 there was any purpose to include a part of the bed of the lake. No such claim is made, further than the acts of the parties would be affected by the rule of law as to such riparian owners."

The decision of the lower court denying the plaintiff, the owner of Lot No. 6, any right or interest in Lot No. 7 was affirmed; in other words, it was held that a person who had title to a section of swamp land took no title to a lake within the section, if the same was meandered and segregated.

If a title to swamp land would not carry with it a meandered lake within its borders in this state, certainly it would not carry title to a meandered lake separate and distinct from the swamp land grant.

Under the head of sovereign power, counsel discourses at length as to how the state could obtain title to the beds of non-navigable meandered lakes, and states that "the title to the soil under the non-navigable inland lakes of Iowa passed to the state under the swamp land grant."

We have already directed attention to the fact that our supreme court in the case at bar has held otherwise, for the reason that "no patent ever issued from the United States to the state of Iowa therefor, and for this reason the lawful title thereto, if a part of the swamp lands, remains in the general government." (143 Iowa, bottom of page 400), and see cases cited.

Just how the state obtains its title and jurisdiction seems to have bothered many courts and is discussed by

counsel. Attention is particularly called to the act of congress admitting the states of Iowa and Florida to the Union, approved March 3, 1845, in which it is declared that "said states shall never interfere with the primary disposal of the soil within the same by the United States."

This, and other acts of congress and treaties, are referred to by our own supreme court in the case at bar. If this were a case in which plaintiff in error was claiming through a title direct from the United States government, in other words, if the United States government in its plenary power to dispose of public lands had conveyed the meandered lake in question and the state was asserting title, a difficult problem might arise, but even then, the later decisions make it clear that the United States would waive its right in favor of the state.

In the case of *United States vs. Chandler Dunbar Company*, 209 U. S., page 447, on page 451, this court directed attention to a similar provision with reference to the admission of Michigan to the Union. The court said that notwithstanding that no right was conferred upon the state of Michigan "to interfere with the soil by the United States and under their authority of the vacant and unsold lands within the limits of said state," and again by a condition that the states should "never interfere with the primary disposal of the soil within the same by the United States, we cannot think that these provisions excepted such islands from the admitted transfer to the state of the bed of the streams surrounding them" and that "the bed of the river could not be conveyed by the patent of the United States alone, but if such is the law of the state, the bed will pass to the patentee by the help of that law," etc.

The case of *Kean vs. Calumet Canal Company*, 190 U. S., 452, and other cases heretofore cited by appellee make it clear that even if a conflict arises between the state and federal government as to title to the beds of non-navigable meandered lakes, that the federal government will waive its right and permit the conveyancing to be controlled by the law of the state in which the non-navigable lake is situated, and that the title passes to the state in non-navigable lakes by a conveyance of the upland, the court saying on page 459:

> "On general principles of conveyancing the state would have acquired the land in controversy here by a conveyance from the United States describing the upland according to the survey, because the local law of Indiana and the common law as understood by this court are the same, so far as this case is concerned."

In *Hardin vs. Jordan*, 140 U. S., 371, the court recognized that there are a number of states in which, according to the law of the state, title is asserted in the state of all of its non-navigable meandered lakes.

And in the case of *Hardin vs. Shedd*, the court says that the United States assumes the position of a private owner but subject to the general law of the state so far as its conveyances are concerned.

All of the earlier decisions then of our supreme court (*Rood vs. Wallace*, 109 Iowa, 5; *Carr vs. Moore*, 119 Iowa, 152; *State of Iowa vs. Thompson*, 134 Iowa, 25, assert title in the state of Iowa of the beds of non-navigable meandered lakes, and this is expressly asserted by the acts of our state legislature. See chapter 186, acts of the Thirtieth General Assembly of Iowa; chapter 197, acts of the Thirty-second General Assembly of Iowa, but in the case at bar our supreme court recognized that if there was

doubt about the absolute title being in the state, that in any event, the state of Iowa had jurisdiction over the lake and held it in trust for the use and benefit of all the people for boating, fishing and the like. In any event, no one can question the title of the state of Iowa in the meandered lakes unless it be the federal government.

The state contends then (1st) that appellant is entitled to no relief in this court because no federal question is involved. (2d) That if the court finds a federal question is involved, the appellant is entitled to no relief under the swamp land act because it is conclusively shown that no patent was ever issued to the particular land in question, that the same was never listed or included in the swamp land grant from the federal government to the state, and from the state to Greene county, Iowa; and that the question of whether there is any mistake in the character of the land, that is to say, as to whether there was any mistake in meandering the lake and segregating it from the public lands must be determined in the first instance by the general land department, and if upon a hearing upon this question before the secretary of the interior, the secretary of the interior considers the matter and makes a finding, his decision is final and conclusive and cannot be assailed in a collateral proceeding, but independently of the action of the secretary of the interior, and the general land department, the appellant is entitled to no relief because the lower court who heard the case in the first instance made an express finding that no mistake had been made; that Goose lake was a body of water proper to be meandered at the time it was so meandered and this finding was affirmed by the supreme court of the state of Iowa.

The decision of the supreme court of Iowa should, therefore, be affirmed.

Respectfully submitted,

GEORGE COSSON,
Attorney General of Iowa.

MARSHALL DENTAL MANUFACTURING COMPANY *v.* STATE OF IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 104. Argued December 19, 1912.—Decided January 6, 1913.

Quære: Whether this court can go behind successive findings of the Secretary of the Interior and the state court that a lake was properly meandered and the lands within its area were not swamp. In this case no reason appears for so doing.

By the law of Iowa riparian owners take only to the water's edge and grants of the United States follow the state rule and convey no land under an unnavigable lake.

The title to the bed of a meandered lake formerly within the public domain of the United States, for which no patent has been issued, either remains in the United States or has passed under the Swamp Land Act to the State.

Under such circumstances a State has, by virtue of its sovereignty, an interest sufficient to entitle it to maintain an action against one intruding without title.

143 Iowa, 398, affirmed.

THE facts, which involve the title to a meandered lake in the State of Iowa, are stated in the opinion.

Mr. E. B. Evans for plaintiff in error.

Mr. George Cosson, Attorney General of Iowa, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition brought by the State of Iowa to enjoin the defendants from draining the waters of Goose Lake, in Greene County, Iowa. The defendant, now

plaintiff in error, set up title, on the ground that the so-called lake, a tract of several hundred acres, was swamp land and was granted to the State by the act of September 28, 1850, c. 84, 9 Stat. 520; Rev. Stats. § 2479; that it passed to Greene County by an act of the legislature of January 13, 1853, and thence by mesne conveyances to this defendant. After a trial the court of first instance entered a decree for the plaintiff, and the decree was affirmed by the Supreme Court of the State. 143 Iowa, 398.

The material facts are few. In the original survey by the Government in 1853 the lake was meandered, which meant under the instructions to surveyors then in force that it was a lake or deep pond, and no patent ever has issued from the United States. In 1903 the plaintiff in error applied to the Secretary of the Interior to have the land surveyed as swamp land, but the application was refused, on the ground that it did not appear sufficiently that there was not a lake there, as indicated, at the time of the survey. If the question of fact was open under *(Hannibal & St. Joseph) Railroad Co.* v. *Smith*, 9 Wall. 95, the state courts found that Goose Lake was an unnavigable body of water proper to be meandered, and we see no sufficient reason for going behind these successive findings, if we had power to do so. *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668. See *French* v. *Fyan*, 93 U. S. 169. *McCormick* v. *Hayes*, 159 U. S. 332. It follows that the plaintiff in error shows no title. By the law of Iowa the riparian owners took title only to the water's edge, and therefore the grants of the adjoining land by the United States did not convey the land under the lake. *Hardin* v. *Jordan*, 140 U. S. 371. *Hardin* v. *Shedd*, 190 U. S. 508. *Whitaker* v. *McBride*, 197 U. S. 510, 512. It follows that the bed of the lake either still belongs to the United States or must be held to have passed to the State.

The question as to the title to the bed is treated as open

in *Hardin* v. *Shedd*, 190 U. S. 508, 519, and *Whitaker* v. *McBride*, 197 U. S. 510, 515, and there is no need to decide it now. It is enough to say that by virtue of its sovereignty the State of Iowa has an interest in the condition of the lake sufficient to entitle it to maintain this suit against an intruder without title, whether the State owns the bed or not. This principle has been affirmed and acted on by the court so recently that it does not require further argument here. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 356. See also *Kansas* v. *Colorado*, 206 U. S. 46, 93. *McGilvra* v. *Ross*, 215 U. S. 70, 79.

Decree affirmed.